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The INDIANA LAW REVIEW is the property of Indiana University and is published six times yearly, November, December, January, March, April, and May, by the Indiana University Indianapolis Law School which assumes complete editorial responsibility therefor.

Subscription Rates: one year \$9.50; three years, \$25.00; five years \$33.00; Canadian, \$9.50; foreign, \$11.00. Single copies, \$2.00. Back issues, volume 1 through volume 7, number 1, are available from Fred B. Rothman & Co., 57 Leuning Street, South Hackensack, New Jersey 07606.

Send all correspondence to Business Manager, *Indiana Law Review*, Indiana University Indianapolis Law School, 735 West New York Street, Indianapolis, Indiana 46202.

Publication Office: 735 West New York Street, Indianapolis, Indiana 46202.

Second-class postage paid at Indianapolis, Indiana 46201.

Volume 7 January 1974 Number 3

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INDIANA LAW REVIEW

LESSONS OF SOVIET JURISPRUDENCE:
LAW FOR SOCIAL CHANGE VERSUS INDIVIDUAL RIGHTS

DAVID A. FUNK*

It is of the essence of reason and morality that they cannot result from legal compulsion but can only be achieved in freedom. This wrecked enlightened despotism, which constituted another form of individualism, for it wanted to serve the individuals—serve them even against their wills—and to enforce the unenforceable—reason and morality.¹

Lawyers hope to be more than mere bureaucratic manipulators of legal rules; they aspire to membership in a learned profession. This requires some understanding of the chief differences between the Anglo-American legal systems and the other major legal systems in the world. Few American lawyers expect to have much professional contact with these other legal systems, especially the Marxian socialist ones. Hence the practical need for familiarity with these legal systems in detail is limited. The significance of the Marxian socialist legal systems for the average American lawyer lies not in the realm of legal practice, but in the realm of legal ideas. In this realm these legal systems are significant indeed, not only for general understanding of the operation of law in Communist countries and lesser developed ones torn between Marxian socialism and liberal democracy, but for understanding current rhetoric about law in the streets of America as well.

Unwittingly, American legal education has created an obstacle to understanding the larger implications of Marxian socialist law. Heretofore, American law schools have emphasized a particular method of learning legal rules and dealing with them. It

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¹Radbruch, *Rechtsphilosophie*, in THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN 43, 99 (1950).

consists largely of verbal analysis of executive, legislative, or judicial documents as applied to specific fact situations. This educational procedure nourishes a tendency to consider larger ideas about law as useless and unknowable. It is easy to dismiss serious thought about them with the comment "whatever that means." Larger ideas about law are not always studied best in judicial opinions of actual cases or document-oriented descriptions of legal institutions. Sometimes jurisprudential ideas may be studied most profitably in their most obvious form: prose written for the primary purpose of purveying ideas. For example, an American lawyer may absorb from his legal culture sufficient ideas about liberal democracy to deal with the fundamental concepts of American constitutional law without reading the *Federalist Papers*. If he wants to understand the Islamic legal systems, however, and consider the lessons of Islamic jurisprudence, he should have some familiarity with the basic ideas in the Koran. Similarly, understanding the Marxian socialist legal systems and the implications of Marxian socialist jurisprudence requires some familiarity with the Marxist-Soviet classics as a system of foreign jurisprudence.

This inquiry need not detract from the study, using traditional methods and materials, of the Soviet legal system as a system of foreign law. Such study purports to understand the operation in practice of the Soviet legal system and its legal institutions. Nor need a study of Soviet jurisprudence interfere with the development of a sociology of Soviet law to determine the actual interrelations of Soviet law and Soviet society. In fact, these three studies may complement each other, and full understanding eventually requires knowledge of all three: Soviet jurisprudence, Soviet law as such, and the sociology of Soviet law. Nevertheless, American lawyers may begin by analyzing Marxist-Soviet ideas as a system of Soviet jurisprudence.² Armed with a notion of what Soviet jurists say they want law to do, the American lawyer is then in a better position to assess the practical operation of the Soviet legal system.

Much Soviet jurisprudence criticizes as "bourgeois law" the law of capitalist countries preceding the communist revolution. Soviet jurists consider this law as mere superstructure, the re-

²On Soviet jurisprudence, see W. FRIEDMANN, *LEGAL THEORY* 367-86 (5th ed. 1967); H. Kelsen, *THE COMMUNIST THEORY OF LAW* (1955); R. SCHLES-

sult of material forces of production. Another major portion of Soviet jurisprudence deals with socialist legality, which justifies support of the state during the dictatorship of the proletariat. This Article focuses on the third major subdivision of Soviet jurisprudence: the role of socialist law, in the period of the dictatorship of the proletariat, in preparing Soviet man for the withering away of the state and the advent of communism. This portion of Soviet jurisprudence is particularly instructive for American lawyers in furnishing an extreme example of a seemingly necessary interrelation between two major functions of law in any legal system.³ The parental or educational function of law in Soviet jurisprudence is to change mankind in preparation for the withering away of the state.⁴ The result of this authoritative program is an increase in the allocation of power to Soviet law-

INGER, *SOVIET LEGAL THEORY* (2d ed. 1950); J. STONE, *SOCIAL DIMENSIONS OF LAW AND JUSTICE* 490-515 (1966); Gsovski, *The Soviet Concept of Law*, 7 *FORDHAM L. REV.* 1 (1938); Hampsch, *Marxist Jurisprudence in the Soviet Union*, 35 *NOTRE DAME LAW.* 525 (1960).

³See generally Funk, *Major Functions of Law in Modern Society*, 23 *CASE W. RES. L. REV.* 257 (1972). "The seventh major function of law is to serve as an instrument of conscious change, either of society or of particular individuals in that society." *Id.* at 288. "The second major function of law is to allocate governmental power in society." *Id.* at 279.

⁴H. BERMAN, *JUSTICE IN THE U.S.S.R.* 284 (rev. ed. 1963) observed:

It is apparent that the Soviet emphasis on the educational role of law presupposes a new conception of man. The Soviet citizen is considered to be a member of a growing, unfinished, still immature society, which is moving toward a new and higher phase of development. As a subject of law, or a litigant in court, he is like a child or youth to be trained, guided, disciplined, protected. The judge plays the part of a parent or guardian; indeed the whole legal system is parental.

See also Hazard, *The Trend of Law in the U.S.S.R.*, 1947 *WIS. L. REV.* 223. One of the two categories into which the aspects of Soviet law may be placed is "the measures necessary to guide society toward that goal of economic abundance and inherently disciplined living on the part of every citizen which will make the state as an apparatus of compulsion unnecessary." *Id.* at 224.

Soviet jurists have been divided into two broad categories, the proceduralists and the paternalists. Campbell, *The Legal Scene: Proceduralists and Paternalists*, *SURVEY*, Oct. 1965, at 56 *passim*. The proceduralists emphasize "socialist legality" in the sense of the expansion of individual rights and "the prevention, where possible, of wholly arbitrary actions." Ginsburgs, *The Political Undercurrents of the Legal Dialogue*, 15 *U.C.L.A.L. REV.* 1226 (1968). See I. LAPENNA, *STATE AND LAW* 51 (1964). For the traditional mean-

makers and a corresponding decrease in individual rights protected by the rule of law.⁵ This result is a theoretical impediment to the withering away of the state and law and a warning to Western reformers who rely on law for social engineering.⁶ There is a lesson, too, for young American radicals currently attracted to the antilegal, revolutionary rhetoric of Marxism and the idyllic anarchy of communism. They need to consider more carefully the jurisprudential implications of the intervening stage—the dictatorship of the proletariat. This Article will attempt to elucidate this major lesson of Soviet jurisprudence. First, it will summarize the Marxist-Soviet doctrine of the educational function of law. Next, it will test this jurisprudential position against modern educational theory and rule of law doctrines. Finally, it will demonstrate the conflict between the educational function of law and the rule of law in specific Soviet legal institutions and indicate the theoretical impediment that this conflict poses for the withering away of the state and law.

I. THE EDUCATIONAL FUNCTION OF SOCIALIST LAW IN SOVIET JURISPRUDENCE

The materials of Soviet jurisprudence present a special difficulty since the classical Marxist-Soviet statements concerning law are scattered throughout a vast polemical literature. Once these statements are extracted and assembled, the educational function of socialist law in Soviet jurisprudence comprises a relatively harmonious jurisprudential point of view. This portion of Soviet jurisprudence includes four basic doctrines, each of which will be considered in turn. 1) The dictatorship of the proletariat established after the revolution is to wither away and usher in the ultimate goal, communism. 2) Though there is to be no state or law in communist society, some continuing administration of things, with law-like rules, remains. 3) The role of socialist law

ing of socialist legality, see note 113 *infra*. This Article deals solely with the paternalist program and its implications.

⁵See text accompanying notes 185-215 *infra*.

⁶Funk, *supra* note 3, at 290-92. Ancient and modern jurists who advocate using law to change society or individuals, from the "social engineering" of Dean Pound to the rechanneling of conduct along new lines of Professor Llewellyn, are liberal democrats for the most part, not Marxists. Careful analysis of Soviet jurisprudence, however, suggests the necessity of adequate rules of control even in their liberal democratic proposals of reform.

during the dictatorship of the proletariat is to educate people so the state can wither away and be replaced by a mere administration of things. 4) Socialist law is to perform this role by habituating people to behave correctly without the necessity of state compulsion so that law, as such, will no longer be necessary. Each of these doctrines may be found in the classical materials of Soviet jurisprudence.

A. *The Withering Away of the State and Law*

The educational function of socialist law in Soviet jurisprudence can be understood only in relation to its ultimate goal—the withering away of the state and law and the advent of communism. Karl Marx predicted that there would be substituted for the old civil society “an association which will exclude classes and their antagonism, and there will no longer be any political power.”⁷ In the *Communist Manifesto*, he described a vast association of the whole nation with the public power losing its political character.⁸ He referred to the conversion of the functions of the state into a mere superintendence of production⁹ and finally observed that all social and political inequality arising from class distinctions would disappear of itself.¹⁰

Friedrich Engels described the transition to communism as the dying out of the state. He indicated that political authority would disappear as a result of the coming social revolution, that is, that public functions would lose their political character.¹¹ He wrote of “the future conversion of political rule over men into an administration of things and a direction of processes of production—that is to say, the ‘abolition of the state,’ about which recently there has been so much noise.”¹² His famous prediction

⁷Marx, *Excerpt from Poverty of Philosophy*, in SELECTED WRITINGS IN SOCIOLOGY AND POLITICAL PHILOSOPHY 239 (T. Bottomore & M. Rubel eds. 1956).

⁸Marx & Engels, *Manifesto of the Communist Party*, in 1 K. MARX & F. ENGELS, SELECTED WORKS 21, 54 (Moscow ed. 1962).

⁹*Id.* at 63.

¹⁰Marx, *Critique of the Gotha Programme*, in 2 K. MARX & F. ENGELS, SELECTED WORKS 13, 30 (Moscow ed. 1962).

¹¹Engels, *On Authority*, in 1 K. MARX & F. ENGELS, SELECTED WORKS 636, 639 (Moscow ed. 1962).

¹²Engels, *Socialism: Utopian and Scientific*, in 2 K. MARX & F. ENGELS, SELECTED WORKS 93, 123 (Moscow ed. 1962).

follows, that "[s]tate interference in social relations becomes, in one domain after another, superfluous, and then dies out of itself; the government of persons is replaced by the administration of things, and by the conduct of processes of production. The state is not 'abolished.' It dies out."¹³

Vladimir Ilich Lenin further developed the doctrine of the withering away of the state and law. He claimed that "once the majority of the people, *itself* suppresses its oppressors, a 'special force' for suppression is no longer necessary [and] [i]n this sense the state *begins to wither away*."¹⁴ He expected the role of state officials to be reduced to that of carrying out the orders of the armed workers as moderately paid managers, and that the beginning of a revolution on this basis

of itself leads to the gradual "withering away" of all bureaucracy, to the gradual creation of a new order, an order without quotation marks, an order which has nothing to do with wage slavery, an order in which the more and more simplified functions of control and accounting will be performed by each in turn, will then become a habit, and will finally die out as special functions of a special stratum of the population.¹⁵

He expected that everybody, without exception, would be able to perform state functions, and this would "lead to a *complete withering away* of every state in general."¹⁶ Lenin considered the Paris Commune of 1871 to be a close approximation of a state about to wither away. He observed that:

[The Commune departed from] the state in its proper sense. And had the Commune asserted itself as a lasting power, remnants of the state would of themselves have "withered away" within it; it would not have been necessary to "abolish" its institutions; they would have ceased to function in proportion as less and less was left for them to do.¹⁷

¹³*Id.* at 151.

¹⁴V. LENIN, *State and Revolution*, in 2 SELECTED WORKS 301, 335 (Moscow ed. 1960).

¹⁵*Id.* at 341.

¹⁶*Id.* at 397.

¹⁷*Id.* at 354.

Lenin reported that the revolution had already established in Russia, "although in a weak and embryonic form, precisely this new type of 'state.'"¹⁸ Further, this was "no longer a state in the proper sense of the term, for in some parts of Russia . . . contingents of armed men are *the people themselves*, the entire people, and not certain privileged persons placed over the people, and divorced from the people, and irremovable in practice."¹⁹ Later, Lenin claimed that "we really have an organization of power which clearly indicates the transition to the complete abolition of any power, of any state. This will be possible when every trace of exploitation has been abolished, that is, in socialist society."²⁰ Thus, Lenin described tendencies in the Paris Commune and the Soviet state which lead to the eventual withering process. Such descriptions of developing tendencies give further indication of the specific processes during the dictatorship of the proletariat that are to lead eventually to the withering of the state and law. Lenin did not explain in any greater detail, however, the processes which are to produce this result or the specific results implied by these processes.

Soviet jurists during the 1920's dealt more specifically with the doctrine of the withering away of the state as applied to law. M. A. Reisner anticipated that law would die out forever²¹ and explained:

*The formula which economically and in reality assures that which is unequal to each unequal person [i.e. gives to each according to his needs], and furthermore guarantees without any sort of contest and without any subjective importunity, as well as without the compromise which crowns the real correlation of struggling forces with its ideology of a contract—this formula will kill all law.*²²

¹⁸V. LENIN, *The Tasks of the Proletariat in Our Revolution*, in 2 SELECTED WORKS 53, 81 (Moscow ed. 1960).

¹⁹*Id.*

²⁰V. LENIN, *Report on the Activities of the Council of Peoples' Commissars Jan. 11, 1918*, in 2 SELECTED WORKS 585, 594-95 (Moscow ed. 1960).

²¹Reisner, *Law, Our Law, Foreign Law, General Law*, in SOVIET LEGAL PHILOSOPHY 83, 108 (H. Babb transl. 1951).

²²*Id.* at 108-09.

E. B. Pashukanis discussed the legal implications of Marxism and expressly equated the dying out of the state and the dying out of law. He referred to the dying out of law in general²³ and the gradual disappearance of the juridic element in human relations in terms strongly suggestive of the statements of Engels and Lenin on the withering away of the state.²⁴ He included the doctrine of the dying out of law and therewith of the state in his discussions of Marx and Lenin.²⁵ Although the withering away of law and legal institutions is the logical consequence of the withering away of the state, Reisner and Pashukanis explicitly recognized this relationship. Whatever else of organization remains in communism, at least one cannot expect enforcement by legal institutions of social norms formulated in laws.

Strictly speaking, the idea of withering, as applied to the state and law, is only an analogy to plant life and cannot apply literally to a state. The application of this term to the state and law, however, at least suggests that withering is a gradual process which is a natural result of other actions. Thus, it appears to be an automatic process, so that in the end nothing need be done to the state to cause the state and law to disappear. The withering away of the state and law by a process analogous to natural decay provides one preview of communist society in Soviet jurisprudential thought. There will be no political power or public power with a political character. The state will become superfluous and unnecessary, disappear, cease to function, wither away and die out; and so will law.

B. The Continuing Administration of Things

The second major doctrine of Soviet jurisprudence envisions a continuing administration remaining even after the state and law have withered away. This implies law-like rules, at least, in communist society. Marx foresaw an association of the whole

²³Pashukanis, *The General Theory of Law and Marxism*, in *SOVIET LEGAL PHILOSOPHY* 111, 121 (H. Babb transl. 1951).

²⁴*Id.*

²⁵*Id.* at 123. For a typical recent statement, see Kerimov, *Liberty, Law and the Legal Order*, 58 NW. U.L. REV. 643, 656 (1963). In the coming society "there will be need neither of government nor of law. In that society law will be replaced by the rules of communist society, the observation and fulfillment of which will be realized by highly conscious and fully free people without governmental compulsion." *Id.*

nation²⁶ and the continuing superintendence of production.²⁷ Engels added the administration of things²⁸ and the conduct of processes of production.²⁹ Lenin envisioned performance of state functions even after the state withered.³⁰ Already communist society does not sound like complete anarchy.

Some social order can be inferred from the distributive principle that in communism each person will contribute according to his ability and receive according to his needs.³¹ Even assuming that each person is perfectly amenable to this program and knows perfectly his own ability and needs, there remains a Herculean task of organization to carry out the exchange. There is no reason to assume that the total goods and services contributed according to ability will exactly match the total goods and services needed. If there is a deficiency, the amount of it must be ascertained and each person must know what portion of his own needs he may satisfy. If there is a surplus, and it is not to be wasted, someone must decide how it is to be distributed.

Marx did not deal with problems of total surplus or deficit, since he was only sketching the outlines of communist society. Nevertheless, he did foresee an association for continuing superintendence of production.³² Marx and Engels admitted that this conversion of the functions of the state into a mere superintendence of production was then Utopian due to the very undeveloped state of the proletariat.³³ Marx finally stated that the labor of superintendence and management is a kind of productive labor which must be performed in every mode of cooperative produc-

²⁶See note 8 *supra*.

²⁷See note 9 *supra*.

²⁸See note 12 *supra*.

²⁹See note 13 *supra*.

³⁰See note 16 *supra*.

³¹Kelsen, *The Law as a Specific Social Technique*, 9 U. CHI. L. REV. 75, 85-86 & n.5 (1941), observed that "[t]here is a notorious contradiction between the economic and political theory of Marxian socialism" in that "[t]he norms of the socialistic ordering of the economic life can only appear in the form of commands directed by individuals to individuals, a 'government over individuals.'"

³²See notes 8-9 *supra*.

³³Marx & Engels, *supra* note 8, at 63.

tion.³⁴ He observed that "[a]ll work in which many individuals cooperate, necessarily requires for the co-ordination and unity of the process a directing will, and functions which are not concerned with fragmentary operations but with the total activity of the workshop, similar to those of the conductor of an orchestra."³⁵ Thus, superintendence was considered a universal necessity, though its degree was said to be proportional to the class antagonisms in the economic system. Apparently, less superintendence would be required in communism than in precommunistic societies.

Engels, possibly from his experience as a manufacturer, likewise saw that some superintendence is required for the operation of modern industry and anticipated a need for direction of the processes of production.³⁶ He used the specific example of a cotton spinning mill after the revolution and concluded in this respect, that "[w]anting to abolish authority in large-scale industry is tantamount to wanting to abolish industry itself, to destroy the power loom in order to return to the spinning wheel."³⁷ Engels contrasted this continuing administration of things³⁸ with the anarchy of social production under capitalism. He foresaw the replacement of capitalism after the revolution by systematic, definite organization³⁹ and a predetermined plan.⁴⁰ Public functions then would be transformed into the simple administrative functions of watching over the true interests of society.⁴¹ He criticized an anarchist for equating authority with the state and ab-

³⁴Marx, 3 *Capital*, in *SELECTED WRITINGS IN SOCIOLOGY AND SOCIAL PHILOSOPHY* 150 (T. Bottomore & M. Rubel eds. 1956).

³⁵*Id.* Marx apparently adopted the common notion that the individual members of an orchestra produce the music and the conductor merely coordinates their efforts. It may also be said that musical interpretation is the key element, not the production of sounds, so that the conductor alone is playing the music through the actions of the individual musicians. The truth lies somewhere in between.

³⁶*See* note 12 *supra*.

³⁷Engels, *supra* note 11, at 637.

³⁸*See* notes 12-13 *supra*.

³⁹Engels, *supra* note 12, at 153.

⁴⁰*Id.* at 155.

⁴¹Engels, *supra* note 11, at 639.

solute evil, and concluded, "Indeed, how these people propose to run a factory, operate a railway or steer a ship without having in the last resort one deciding will, without single management, they, of course, do not tell us."⁴² In discussing the continuing superintendence in communist society, Engels thus recognized the necessities of modern industry. Administration of things and direction of the processes of production imply authority, systematic organization, predetermined plan, deciding will and management. Though the state and law are to die out, obviously much organization and authority will remain. If this is not law supported by state compulsion, however, it is fair to ask more specifically what sort of law-like nonlaw it is.

Lenin furnished many more specific examples, though he did not explicitly apply them to communist society. He often described the contrast between bourgeois society and the dictatorship of the proletariat, along with the tendencies developing during the dictatorship of the proletariat just prior to the advent of communism. The order continuing under communism, however, is not simply the further development of these tendencies; Lenin carefully indicated that communism is somehow different. Nevertheless, the language he used with respect to the dictatorship of the proletariat suggests additional features of the administration which is to remain in communism after the state and law have withered away. Lenin clearly divided history into the periods of bourgeois society, the revolution, the dictatorship of the proletariat, and communism. Sometimes, however, he used "socialism," or the "first phase of communism," as synonyms for the dictatorship of the proletariat. Similarly, he sometimes used the "higher phase of communism" as another name for the final period of communism. In any event, he indicated some specific institutions to be abolished, as he contrasted bourgeois society and the dictatorship of the proletariat. Apparently these institutions, at least, will not be part of the continuing administration after the state and law wither away.

A consistent theme of Lenin's writings is that the police, army, and bureaucracy⁴³ of bourgeois society will be replaced by

⁴²Letter from F. Engels to T. Cuno, January 24, 1872, in 2 K. MARX & F. ENGELS, *SELECTED WORKS* 467, 469 (Moscow ed. 1962). The anarchist referred to is Mikhail Alexandrovich Bakunin.

⁴³V. LENIN, *The Tasks of the Proletariat in the Present Revolution*, in 2 *SELECTED WORKS* 43, 47 (Moscow ed. 1960).

the armed masses⁴⁴ of the people. The objection to the police is not spelled out, except that it is part of the oppressive apparatus.⁴⁵ The additional objection to the army, or at least a standing army,⁴⁶ is that it is divorced from the people.⁴⁷ The objection to the bureaucracy, in addition to its being the third component of the chiefly oppressive apparatus,⁴⁸ is that it is privileged.⁴⁹ So important are these three bourgeois institutions that Lenin claimed that the state apparatus consists primarily of the standing army, the police, and the bureaucracy.⁵⁰

In contrast to this bourgeois state apparatus, Lenin described a new state apparatus⁵¹ to be established by the proletariat. In place of the old police, army, and bureaucracy,⁵² there will be the arming of the whole people,⁵³ sometimes characterized as the armed workers and peasants themselves,⁵⁴ the universally armed people themselves,⁵⁵ the armed masses of the population,⁵⁶ the universally armed people,⁵⁷ or the organized and armed masses of the proletariat and peasantry.⁵⁸ The key consideration is that these armed workers and peasants are not divorced from the people.⁵⁹ These terms already display the tension observed in

⁴⁴V. LENIN, *supra* note 14, at 374.

⁴⁵V. LENIN, *Can the Bolsheviks Retain State Power?*, in 2 SELECTED WORKS 421, 438 (Moscow ed. 1960).

⁴⁶*Id.*

⁴⁷V. LENIN, *supra* note 43, at 67.

⁴⁸V. LENIN, *supra* note 45, at 438.

⁴⁹V. LENIN, *supra* note 43, at 67.

⁵⁰V. LENIN, *supra* note 45, at 434.

⁵¹*Id.* at 435.

⁵²V. LENIN, *supra* note 43, at 47.

⁵³*Id.*

⁵⁴V. LENIN, *The Dual Power*, in 2 SELECTED WORKS 50 (Moscow ed. 1960).

⁵⁵*Id.*

⁵⁶V. LENIN, *supra* note 18, at 58.

⁵⁷*Id.* at 67.

⁵⁸V. LENIN, *Resolution on the Current Situation*, in 2 SELECTED WORKS 146, 148 (Moscow ed. 1960).

⁵⁹V. LENIN, *supra* note 18, at 67.

Marx and Engels, between "state and law," which are to wither away, and a law-like "administration" which is to continue without state compulsion. Lenin's emphasis on direct action of the masses suggests direct, informal, spontaneous action without any legal compulsion, whereas the army analogy suggests the most extreme organization and structured authority.

The new society also will differ from the old bourgeois society with respect to control, supervision, and accounting.⁶⁰ The very key to all control, according to Lenin, is the abolition of commercial secrecy.⁶¹ In bourgeois society this leads to the "extremely complex, involved and wily tricks that are resorted to in drawing up balance sheets, in founding fictitious enterprises and subsidiaries, [and] in resorting to the services of figure-heads."⁶² This makes the income tax very largely a fiction in bourgeois society, he claimed, due to concealment of property and incomes.⁶³ The dictatorship of the proletariat will remedy this by "investing every group of citizens of substantial democratic numerical strength (1,000 or 10,000 voters, let us say) with the right to examine *all* the documents of any large enterprise."⁶⁴ This would develop popular initiative in control⁶⁵ and make this control effective and democratic.⁶⁶ At the same time, institution of the fullest, strictest, and most detailed accountancy,⁶⁷ with weekly reports and amalgamation of disunited establishments into a single syndicate,⁶⁸ is expected to enable the economy to attain tremendous proportions.⁶⁹ In the process of eliminating the deceptive complications resulting from commercial secrecy,

⁶⁰V. LENIN, *The Impending Catastrophe and How to Combat It*, in 2 SELECTED WORKS 251, 256 (Moscow ed. 1960).

⁶¹*Id.* at 269.

⁶²*Id.* at 262.

⁶³*Id.*

⁶⁴*Id.* at 270.

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷*Id.* at 274.

⁶⁸*Id.*

⁶⁹*Id.*

accountancy and control become reduced to simple entries that anyone can make.⁷⁰ Lenin saw this as the essence of the socialist transformation and the chief measure for eliminating waste.⁷¹ First, there will be unity of accounting, then control, and finally regulation of economic life, through nationwide accounting and control. Again, the same basic tension appears. On the one hand, inspection of accounts by large masses of voters and elimination of tricks so that any literate person is able to understand business operations represents an informed, stateless, lawless element. On the other hand, weekly reports and nationwide control imply supervision of the economy, and all that goes on in it, through unified and extremely detailed accounting, which in turn implies a vast network of law-like rules of administration.

Turning to the general institutional arrangements of government, Lenin placed great emphasis on direct democracy.⁷² This is variously phrased as direct initiative of the people,⁷³ direct rule of people themselves,⁷⁴ direct expression of the mind and will of the majority,⁷⁵ the obvious and indisputable support of the majority,⁷⁶ and direct, open force.⁷⁷ Presumably this is in the spirit of the November 5, 1917, message to the population:

Comrade toilers: Remember that now *you yourselves* are at the helm of the state. No one will help you if you yourselves do not unite and take into *your hands all affairs* of the state. . . . Get on with the job yourselves; begin right at the bottom, do not wait for anyone⁷⁸

⁷⁰V. LENIN, *supra* note 14, at 364.

⁷¹V. LENIN, *supra* note 60, at 266.

⁷²*See, e.g.*, V. LENIN, *supra* note 45, at 435-36.

⁷³V. LENIN, *supra* note 43, at 50.

⁷⁴*Id.* at 51.

⁷⁵*Id.* at 52.

⁷⁶V. LENIN, *supra* note 18, at 58.

⁷⁷Speech by V. Lenin, Seventh (April) All-Russian Conference of the R.S.D.L.P. (B.), in 2 SELECTED WORKS 91, 104 (Moscow ed. 1960).

⁷⁸V. LENIN, *To the Population*, in 2 SELECTED WORKS 529, 530 (Moscow ed. 1960).

On the other hand, Lenin also considered the Soviets as a new state apparatus⁷⁹ modeled after the Paris Commune. The Soviet state is described as not a state in the proper sense of the term,⁸⁰ but a transition⁸¹ state, a harbinger of the withering away of the state in every form,⁸² the first steps towards socialism,⁸³ and the first stage of a socialist society.⁸⁴ Again, Lenin juxtaposed withering away of the state and law with continuing organization. His emphasis on direct action of the masses implies statelessness; but the organization by Soviets as a first step in the transition, though not a state in the proper sense, is also labelled a new state apparatus. This implies some continuing organization of the Paris Commune type, at least up to the beginning of communism.

Early writings of Lenin discussing the continuing administration under the dictatorship of the proletariat, with his assumption that anyone may be an administrator, imply that universal administration may be another characteristic of society after the withering of the state. Prior to the spring of 1918, Lenin was convinced that administration could be carried out by any literate person,⁸⁵ and therefore the poor were to be drawn into administration.⁸⁶ The accounting and control functions were fully within the abilities of all,⁸⁷ though Lenin saw that some rudimentary training would be required.⁸⁸ Even in his early writings, however, Lenin admitted that specialists and technicians, as distinguished from general administrators, were necessary. He referred

⁷⁹V. LENIN, *supra* note 45, at 435.

⁸⁰V. LENIN, *supra* note 18, at 81.

⁸¹Speech by V. Lenin, First All-Russian Congress of Soviets of Workers' and Soldiers' Deputies: On the Attitude Towards the Provisional Government, in 2 SELECTED WORKS 175, 177 (Moscow ed. 1960).

⁸²V. LENIN, *supra* note 18, at 81.

⁸³V. LENIN, *supra* note 77, at 106.

⁸⁴*Id.*

⁸⁵V. LENIN, *supra* note 45, at 439.

⁸⁶*Id.* at 443.

⁸⁷V. LENIN, *How to Organize Emulation*, in 2 SELECTED WORKS 559, 564, 566 (Moscow ed. 1960).

⁸⁸V. LENIN, *supra* note 45, at 444.

specifically to the need for trained agronomists,⁸⁹ engineers,⁹⁰ and economists.⁹¹ After 1918, moreover, Lenin began to emphasize the necessity for training even general administrators. His later writings stress the art of administration,⁹² characteristics of good administrators⁹³ and bureaucrats,⁹⁴ and finding the right man for the right place.⁹⁵ Finally, tests are advocated so that better government workers may be selected.⁹⁶ Again, the early attitude toward administrators anticipates the stateless aspect of communism: state functions can be performed by everyone, though the state and law have withered. Later emphasis on trained administrators, however, suggests selection, hierarchy, and order in the continuing administration.

One early jurist provided explicit examples of the laws which are to die with the withering of the state and those which are to continue under the administration of things. E. B. Pashukanis drew a distinction between legal regulation, which will die out, and technical regulation, which will actually increase,⁹⁷ and pointed to railroad timetables as examples of merely technical regulation. A railroad timetable is, indeed, a product of rules, but these rules are technical ones imposed in the interests of attain-

⁸⁹Speech by V. Lenin, First All-Russian Congress of Peasants' Deputies: Speech on the Agrarian Question, in 2 SELECTED WORKS 153, 171 (Moscow ed. 1960).

⁹⁰V. LENIN, *supra* note 45, at 449.

⁹¹*Id.*

⁹²V. LENIN, *The Immediate Tasks of the Soviet Government*, in 2 SELECTED WORKS 695, 706 (Moscow ed. 1960).

⁹³V. LENIN, *The Tax in Kind: The Significance of the New Policy and Its Conditions*, in 3 SELECTED WORKS 634, 665 (Moscow ed. 1960).

⁹⁴V. LENIN, *Once Again On the Trade Unions, The Present Situation and the Mistakes of Comrades Trotsky and Burkharin*, in 3 SELECTED WORKS 561, 572 (Moscow ed. 1960).

⁹⁵V. LENIN, *Eleventh Congress of the R.C.P. (B.), March 27—April 2, 1922: Political Report of the Central Committee of the R.C.P. (B.), March 27*, in 3 SELECTED WORKS 725, 762 (Moscow ed. 1960).

⁹⁶V. LENIN, *How We Should Organize the Workers' and Peasants' Inspection: Recommendation to the Twelfth Party Congress*, in 3 SELECTED WORKS 824, 825 (Moscow ed. 1960); V. LENIN, *Better Fewer, But Better*, in 3 SELECTED WORKS 829, 832-33 (Moscow ed. 1960).

⁹⁷Pashukanis, *supra* note 23, at 135-36.

ing maximum hauling capacity. Similar rules in other industries contribute to the construction of a single, planned economy. This is immediate, "administrative-technical-direction in the form of subordination to a general economic plan."⁹⁸ Instead of withering, this type of regulation will signify the gradual dying out of the other type—juridic regulation. Pashukanis pointed to railroad liability, in contrast to railroad timetables, as an example of juridic regulation. So long as the market economy continues, juridic regulation will continue also; but when a single planned economy is achieved, the juridic form of regulation is to die out. As a further example, he cited a table of military organization as mere administrative-technical regulation, in contrast to a draft law, which is a form of juridic regulation.⁹⁹ Thus, Pashukanis saw juridic regulation, presupposing an individual market economy, as dying out in communism, while technical administrative regulation will continue and increase.

The two initial doctrines of Soviet jurisprudence are, therefore, interrelated. The ultimate goal of state and law is communism, which has two contrasting features. The state and law are to wither; but administration under law-like rules without state compulsion is to continue in the realm of production.¹⁰⁰

⁹⁸*Id.* at 178.

⁹⁹*Id.* at 135-36.

¹⁰⁰Only a few Western authors have attempted to piece together an extended description of conditions under communism as set forth in Marxist socialist writings. A notable exception is T. DENNO, *THE COMMUNIST MILLENIUM* (1964), which attempts "a description of the Communist future according to the Communist doctrine, a description which no Communist, as far as the author can determine, has ever attempted." *Id.* at viii. Compare Dr. Denno's description with *FUNDAMENTALS OF MARXISM-LENINISM* 698-717 (2d ed. O. Kuusinen 1963). The present author likewise found no Communist author, at least in English translation, who had attempted a similar description of doctrine bearing on law. After the tedious task of collection and analysis of materials was completed, the present author found, like Dr. Denno, that "[i]t is possible to trace a more or less consistent pattern regarding the future through all Communist thought from Marx down to Khrushchev" and concurs that "[i]n fact most of the material is so consistent that it is, characteristically, extremely repetitive" T. DENNO, *supra* at viii. A second notable attempt to describe extensively all features of communist society reflected in communist writings is referred to in the selected bibliography of Dr. Denno. *Id.* at 159-64. This attempt is a series of six unpublished Master's theses submitted to the Russian Institute at Columbia University between 1950 and 1956: W. Beachner, *Lenin's View of the Future Commun-*

There is no suggestion of a mechanism for enforcement of these rules to replace state compulsion. Man, as presently known, seems to require some compulsion to insure that he will obey rules. Therefore, the next step in Soviet jurisprudence follows: man must somehow be changed or educated to observe the norms required by the continuing administration without any state compulsion. This becomes a task of socialist law during the dictatorship of the proletariat and gives rise to the third fundamental doctrine of Soviet jurisprudence.

C. The Educational Role of Socialist Legal Institutions

The third fundamental doctrine of Soviet jurisprudence is that socialist legal institutions must educate man in preparation for the withering away of the state and law. Basic legislation, defining powers and duties of the Soviet court system, incorporates this doctrine in its statement of purposes as follows:

The court by all of its activity is educating U.S.S.R. citizens in a spirit of devotion to their fatherland and to the cause of socialism in a spirit of unswerving precision in carrying out soviet laws, of care for socialist property, of labor discipline, of an honorable attitude towards state and social duty, and of respect for the rules of socialist life together.¹⁰¹

The implicit goal is to prepare citizens, during the period of socialism, so that the transition to communism may proceed, since

ist Society, 1956; T. Farrelly, *Trotsky's Conception of the Future Communist Society*, 1955; D. Nelson, *The Views of N. Bukharin on the Future Communist Society*, 1952; H. Cole, *Stalin's Views of the Future Good Society*, 1901—January 1924, 1950; and T. Rothchild, *The Highest Phase of Communism According to the Works of Joseph Stalin, 1924-1936*, 1950. See also F. GERLICH, *DER KOMMUNISMUS ALS LEHRE VON 1000-JÄHRIGEN REICH* (1920); Robinson, *Stalin's Vision of Utopia—The Future Communist Society*, 99 *PROC. OF AM. PHILOSOPHICAL Soc'y* 11 (1955).

¹⁰¹Law Concerning the Judicial System of the U.S.S.R. and the Union and Autonomous Republics, art. 3 (1938), translated in Golunskii & Strogovich, *The Theory of State and Law*, in *SOVIET LEGAL PHILOSOPHY* 351, 381 (H. Babb transl. 1951). The present author is indebted to Hildebrand, *The Sociology of Soviet Law: The Heuristic and "Parental" Functions*, 22 *CASE W. RES. L. REV.* 157, 196 (1971), for correcting the citation to this legislation. Cf. D. Funk, *Law as Schoolmaster: Rule of Law Implications and Soviet Theory* 70, 1968 (unpublished thesis in the Ohio State University Library and Harvard and Columbia Law School libraries).

this is the ultimate end of Soviet law itself. This educational role of law was anticipated in the Marxist classics and made explicit by Lenin. Marx had described the educational function of the state during the dictatorship of the proletariat,¹⁰² but did not expressly extend this doctrine to law. His requirement of a transition state, however, implied that such a state, at least in some way, prepares people for the transition to communism, and Marx and Engels clearly distinguished themselves from the anarchists on that score.¹⁰³ Lenin applied this doctrine to legal institutions in describing how the bourgeois court, with its function of exploitation, was scrapped to make way for a people's court. He claimed to have transformed the court from an instrument of exploitation into an instrument of education on the firm foundations of socialist society.¹⁰⁴ He saw the courts as an instrument for inculcating labor discipline to eradicate the outlook of a small proprietor who thinks, "I'll grab all I can for myself; what do I care about the rest?"¹⁰⁵

One early Soviet jurist, E. B. Pashukanis, saw the educative function of law exemplified primarily in the treatment of criminals. He argued that Soviet law should get away from the bourgeois notion of punishment as an equivalent for a wrong, since the whole juridic idea of equivalency, of *quid pro quo*, must die out.¹⁰⁶ In communism, he observed, there is to be merely administrative-technical direction, and people will not look at things from an individual point of view. Instead of seeking to exact equivalents for themselves, people are to see social forces and individual forces as one; but in order to accomplish this, men must be re-educated in this spirit—the spirit of communism.¹⁰⁷

¹⁰²Marx, *The Leading Article of No. 179 of Kolnische Zeitung*, in KARL MARX AND FRIEDRICH ENGELS: ON RELIGION 16, 28 (Moscow ed. 1957).

¹⁰³Engels, *supra* note 12, at 150-51; Marx, *The Civil War in France*, in 1 K. MARX & F. ENGELS, SELECTED WORKS 473, 523 (Moscow ed. 1962); Marx & Engels, *supra* note 8, at 61-64.

¹⁰⁴V. LENIN, *Report on the Activities of the Council of People's Commissars, January 11 (24), 1918*, in 2 SELECTED WORKS 585, 592-93 (Moscow ed. 1960).

¹⁰⁵V. LENIN, *supra* note 92, at 723.

¹⁰⁶Pashukanis, *supra* note 23, at 179. See also note 214 *infra*.

¹⁰⁷*Id.* at 201.

One means of accomplishing this re-education is to use criminal law as a pedagogic measure.¹⁰⁸ Progressive criminologists, therefore, are to cease trying to equate the punishment with the crime. Instead, they are to think of punishment as re-education and seek to devise punishments which re-educate in the fashion required for the communist spirit.¹⁰⁹ The Marxian doctrine that bourgeois law is exploitative and mere superstructure¹¹⁰ implies that law during the dictatorship of the proletariat somehow will be different. Pashukanis analyzed this difference in terms of juridic equivalency and the merging of individual and social forces. He saw equivalency as a reckoning by the individual of how much he is giving and how much he is to get. In the merging of individual and social forces, this is to become irrelevant. Thus criminal law, applied as a pedagogic measure, can help show that in communism, man has no need of this idea of equivalency with its associated concepts of responsibility and freedom of choice.¹¹¹

Later Soviet jurists further developed the doctrine of the educational role of socialist legal institutions. Ivan T. Golyakov dealt specifically with the educational significance of the Soviet court.¹¹² The educational function of legal institutions in building the communist spirit and in eradicating crime is not limited to the support of the state through Soviet legality in its traditional sense of order.¹¹³ Golyakov claimed that the Soviet court has ac-

¹⁰⁸*Id.* at 217.

¹⁰⁹*Id.* at 219.

¹¹⁰See, e.g., Marx, *Preface to a Contribution to the Critique of Political Economy*, in 1 K. MARX & F. ENGELS, *SELECTED WORKS* 361, 362-63 (Moscow ed. 1962). But see Marx, *Inaugural Address of the Working Men's International Association*, in 1 K. MARX & F. ENGELS, *SELECTED WORKS* 377, 382-83 (Moscow ed. 1962), advocating specific reform legislation in England since it allowed universal suffrage.

¹¹¹Pashukanis, *supra* note 23, at 217.

¹¹²I. GOLYAKOV, *THE ROLE OF THE SOVIET COURT* (R. Kramer transl. 1948).

¹¹³*Id.* at 1-2, *passim*. "The most important task of the court [is] the rooting into the conscience of the broad masses of a respect for law and justice." *Id.* at 18.

In contrast to the Soviet doctrine of the educational role of law, the Soviet doctrine of socialist (or revolutionary) legality has had quite different meanings at different times. Immediately after the Bolshevik revolution, revolutionary legality was often contrasted with bourgeois legality. Law

tively assisted the Soviet state "in the great business of the fundamental rebuilding of society in the spirit of communism, the rooting into the consciousness of the broad masses [of] the principles of socialist legality and justice."¹¹⁴ Moreover:

The most important function of the socialistic state is the fundamental remaking of the conscience of the peo-

meant primarily bourgeois law, whereas revolutionary legality was the direct power of the proletariat acting informally against class enemies. H. BERMAN, *supra* note 4, at 28; O. KIRCHHEIMER, *POLITICAL JUSTICE* 285-86 (1961); Kline, *The Withering Away of the State: Philosophy and Practice*, *SURVEY*, Oct. 1961, at 63, 67-68. As Lenin established orderly government, revolutionary legality meant that directives of the central revolutionary authorities must be obeyed in order to prevent decentralization of power and lack of coordination. O. KIRCHHEIMER, *supra* at 286. Joseph Stalin extended the doctrine of socialist legality to include complete obedience to the government. H. BERMAN, *supra* note 4, at 63-65; Kline, *supra* at 68; Hazard, *Book Review*, 77 *HARV. L. REV.* 1561, 1562 (1964). Thus Soviet socialist law was authoritatively defined during the Stalinist period as:

[T]he totality of the rules of conduct, established in the form of legislation by the authoritative power of the toilers and expressing their will—the application of said rules being guaranteed by the entire coercive force of the socialist state to the end (a) of defending, securing and developing relationships and orders advantageous and agreeable to the toilers, and (b) of annihilating, completely and finally, capitalism and its survivals in the economy, manner of life, and consciousness of people, with the aim of building communist society.

A. VYSHINSKY, *THE LAW OF THE SOVIET STATE* 74 (H. Babb transl. 1948). Further, "the Soviet state, having abrogated bourgeois legality and created a new [socialist] legality, requires that all citizens, institutions, and officials observe Soviet laws precisely and without protest." *Id.* at 640. Golunskii & Strogovich, *supra* note 101, at 392, explained that socialist legality "is expressed in guaranteeing that all organs of the soviet state, official personages, and citizens strictly and unswervingly observe the legislation enacted by soviet authority." Trainin, *Comrade Stalin's Teaching on the Base and Superstructure and the Problem of Protecting the Socialist Economic System*, 4 *CURRENT DIGEST OF THE SOVIET PRESS*, No. 18, at 5, 6 (1952); I. GOLYAKOV, *supra* note 112, at 1. Following the death of Stalin in 1953, and especially after the Twentieth Party Congress in 1956, socialist legality came to include procedural rights of the individual against the Soviet state as protection against the excesses of Stalinism. H. BERMAN, *supra* note 4, at 66-71; O. KIRCHHEIMER, *supra* at 289-92. *See generally* Campbell, *supra* note 4, on the proceduralist program. By 1957, however, it was apparent that this new meaning of socialist legality would not be allowed to undermine the authority of the Soviet state. O. KIRCHHEIMER, *supra* at 290-91.

¹¹⁴I. GOLYAKOV, *supra* note 112, at 15.

ple, of the toilers of the new society. A component part of this activity is the reification of justice which, while punishing criminals, at the same time influences the masses, promoting their education in the spirit of socialistic labor discipline and the observance of the rules of socialistic living. The success of such influencing is assured by the fact that crime, in its essence, is not native to a society constructed on new principles and free of contradictions and class antagonisms which give rise to crime.¹¹⁵

Another author maintained that Soviet law plays an important role in strengthening socialist labor discipline by inculcating a communist attitude to work.¹¹⁶ Other authorities discussed the educating function of justice¹¹⁷ and the great educational role of the Soviet court.¹¹⁸ M. S. Strogovich explained more fully:

Marxist-Leninist theory always centers its attention on the tasks of all-round development of the individual and satisfaction of his material and spiritual needs and interests, the education of the new man. This task, clearly formulated in the CPSU Program, demands for its solution a comprehensive system of measures—economic, political, educational, etc. An important place in this system is occupied by juridical, legal measures, the elaboration of which constitutes a direct duty of Soviet jurisprudence.¹¹⁹

Others express similar viewpoints. One claimed that Soviet state law has played, and continues to play, a revolutionary creative role in the development and consolidation of the social relations

¹¹⁵*Id.* at 16.

¹¹⁶Chkhikvadze, *Socialist Law—Important Weapon in Fight for Communism*, 4 CURRENT DIGEST OF THE SOVIET PRESS, No. 27, at 2, 11 (1952).

¹¹⁷Polyansky, *The Soviet Criminal Court As a Conductor of the Policy of the Party and the Soviet Regime*, 4 CURRENT DIGEST OF THE SOVIET PRESS, No. 6, at 8 (1952).

¹¹⁸Pravda, *Review of the Press: Noble Task*, 3 CURRENT DIGEST OF THE SOVIET PRESS, No. 49, at 30 (1952); Tarasov, *Undeviatingly Observe Soviet Socialist Law*, 5 CURRENT DIGEST OF THE SOVIET PRESS, No. 15, at 7, 47 (1953).

¹¹⁹Strogovich, *Problems of Methodology in Jurisprudence*, 4 SOVIET LAW AND GOVERNMENT 13, 20 (1966).

and order desired by, and beneficial to, the working people.¹²⁰ Chairman Khrushchev reported to the Twenty-second Party Congress that the molding of the new man is influenced not only by the educational work of the Party, the Soviet state, the trade unions, and the Young Communist League but by the entire pattern of society's life, including legal regulations and judicial practice.¹²¹ To the editors of *Soviet Justice* "the reorganization of the judicial system pursues the object of creating the most favorable conditions for the work of the people's courts in preventing and eradicating crime and in educating citizens in the spirit of steadfast compliance with Soviet laws and the rules of socialist society."¹²² Many Soviet authors follow the lead of basic legislation defining the powers and duties of the court system, which derives from the Judiciary Act of 1933¹²³ and was authoritatively affirmed in 1936¹²⁴ and 1958.¹²⁵ It is not surprising, in view of this long history, to find this official phraseology adopted by jurists like Denisov and Kirichenko,¹²⁶ Lokhov,¹²⁷ Rasulov,¹²⁸ and

¹²⁰A. DENISOV & M. KIRICHENKO, SOVIET STATE LAW 17 (Moscow ed. 1960).

¹²¹Khrushchev, *Report of the Central Committee of the CPSU to the 22nd Party Congress*, 13 CURRENT DIGEST OF THE SOVIET PRESS, No. 42, at 3, 20 (1961).

¹²²Sovetskaya yustitsia, *Chairman of the District (City) Peoples' Court*, 13 CURRENT DIGEST OF THE SOVIET PRESS, No. 21, at 6 (1961).

¹²³K. GRYZBOWSKI, SOVIET LEGAL INSTITUTIONS 119-20 (1962).

¹²⁴See note 101, *supra*. The language of this version is set forth in the text accompanying note 101 *supra*.

¹²⁵Berman, *Introduction to SOVIET CRIMINAL LAW AND PROCEDURE* 1, 95 (H. Berman & J. Spindler transl. 1966). See also K. GRYZBOWSKI, *supra* note 123, at 120 n.19.

¹²⁶A. DENISOV & M. KIRICHENKO, *supra* note 120, at 301.

¹²⁷Lokhov, *Some Questions on the Judicial System of the U.S.S.R., of the Union and of the Autonomous Republics*, in THE SOVIET LEGAL SYSTEM pt. 1, 38 (J. Hazard & I. Shapiro eds. 1962).

¹²⁸Rasulov, *On Drafts of Principles of Legislation On the Judicial System In the U.S.S.R. and the Union and Autonomus Republics, Statute On Military Tribunals and Principles of Criminal Trial Procedure In the U.S.S.R. and the Union Republics*, 11 CURRENT DIGEST OF THE SOVIET PRESS, No. 4, at 5, 6 (1959).

Chkhikvadze.¹²⁹ Others refer specifically to the educational influence of the trial upon the person before the court,¹³⁰ and claim that Soviet courts have an immense educative influence, not only on the accused but on the people in the courtroom.¹³¹ Sometimes the courts of justice are said to inculcate a new social discipline in the masses¹³² as part of "the creative role of the state and law and their countereffect on the base."¹³³ Thus, Soviet jurisprudence expects socialist legal institutions somehow to educate man and inculcate new attitudes required for an organization of production which dispenses with state and legal compulsion.

D. *The Habituation Process*

The fourth fundamental doctrine of Soviet jurisprudence specifies the method by which new attitudes are to be impressed on man by socialist law. Soviet jurists advocate an educational process in which man will become habituated to the observance of his social duties. Man is to acquire proper habits by becoming accustomed to them. Since the duties are fairly complex, a men-

¹²⁹Chkhikvadze & Kirichenko, *Criminal Law*, in FUNDAMENTALS OF SOVIET LAW 401, 413 (P. Romashkin ed. n.d.).

¹³⁰Boldyrev, *quoted in* Berman, *supra*, note 125, at 96. Gutsenko, Dobrovol'skaya & Raginsky, *Comrades' Courts are a Collective Educator*, 11 CURRENT DIGEST OF THE SOVIET PRESS, No. 42, at 21, 22 (1959), considered the "chief purpose" of comrades' courts to be "the direct educational influence on the offender." U.S.S.R. Supreme Court, *Plenary Session*, 15 CURRENT DIGEST OF THE SOVIET PRESS, No. 28, at 37 (1963), considered "[t]he educational and preventive significance of court trials." U.S.S.R. Supreme Soviet, *Principles of Criminal Procedure in the U.S.S.R. and the Union Republics*, 11 CURRENT DIGEST OF THE SOVIET PRESS, No. 4, at 7 (1959), maintained that "[c]riminal porceedings should help to . . . educate citizens in a spirit of undeviating observances of Soviet laws and respect for the rules of socialist society."

¹³¹Gusev, *Defend, But Do Not Shield: Notes of a People's Assessor*, in 10 CURRENT DIGEST OF THE SOVIET PRESS, No. 40, at 20, 21 (1958). Boldyrev, *supra* note 130, at 96, commented on the educational influence of the trial "upon the person before the courts" and beyond "to other participants in the judicial examination and also to persons present in the courtroom." Dobrovol'skaia, *The Organization and Functioning of the Soviet Court in the Period of the Comprehensive Building of Communism*, 2 SOVIET LAW AND GOVERNMENT 45, 51 (1964), hoped to improve "the educational influence of the trial upon the defendant and the audience."

¹³²Glizerman, *The Socialist State—Mighty Instrumentality for Building Communism*, 3 CURRENT DIGEST OF THE SOVIET PRESS, No. 41, at 7, 9 (1951).

¹³³Izvestia, *Overcome the Lag in the Science of Law*, 5 CURRENT DIGEST OF THE SOVIET PRESS, No. 1, at 3, 5 (1953).

tal act is involved beyond mere conditioning or training. On the other hand, the habits acquired are not necessarily active ones interacting with the forces creating them. Rather, Soviet jurisprudence envisions a unidirectional process in which the Communist Party, as a relatively outside influence, acts through legal institutions to induce observance of new social norms. The citizen accommodates himself to this outside influence and becomes habituated to the prescribed norms.

Lenin explained the habituation process as follows:

[V]ery soon the necessity of observing the simple, fundamental rules of every-day social life in common will have become a *habit*. The door will then be wide open for the transition from the first phase of communist society to its higher phase, and along with it to the complete withering away of the state.¹³⁴

He claimed that in communism:

[T]here will vanish all need for force, for the *subjection* of one man to another, since people will *grow accustomed* to the observance of the elementary rules of social life that have been known for centuries and repeated for thousands of years in all school books; they will become accustomed to observing them without force, without compulsion, without subordination, without the *special apparatus* for compulsion which is called the state.¹³⁵

He maintained that the state will be able to wither away "when people have become accustomed to observe the fundamental rules of social life, and their labour is so productive that they voluntarily work according to their ability."¹³⁶ Finally, he indicated that "in communist society democracy will gradually change and become a habit, and finally *wither away*."¹³⁷

Later Soviet jurists variously amplified the doctrine of habituation through law. Andrei Y. Vyshinsky observed that, in

¹³⁴V. LENIN, *supra* note 14, at 384.

¹³⁵*Id.* at 373-74.

¹³⁶*Id.* at 380.

¹³⁷V. LENIN, *The Proletarian Revolution and the Renegade Kautsky*, in 3 SELECTED WORKS 71, 87 (Moscow ed. 1960).

the highest phase of communism, all will learn to get along without special rules defining the conduct of people under the threat of punishment and with the aid of constraint.¹³⁸ Moreover, people will be so accustomed to observe the fundamental rules of community life that they will fulfill them without constraint of any sort.¹³⁹ Others expected that in communist society:

The rules of life in common will be observed without the restraint exerted by a state mechanism, solely by virtue of the conscious discipline of the communist social order, respect for each other and for their common interests, and established habits which have become part of a mode of living.¹⁴⁰

One jurist, writing on communist society, emphasized that the rules of social behavior must become a habitual sense of collectivism and that one of the most important tasks of communist education is to instill collectivism until it becomes second nature;¹⁴¹ comrades' courts and peoples' public order squads are seen as steps in this direction.¹⁴² Another jurist foresaw that "[f]rom the time when all are administering social affairs on their own, the observation of the fundamental rules of human society will gradually come to be a universal habit, obviating the need for that apparatus of organized and systematic compulsion called the state."¹⁴³ It is admitted that "[t]he advance of Soviet

¹³⁸A. VYSHINSKY, *supra* note 113, at 52.

¹³⁹*Id.*

¹⁴⁰Golunskii & Strogovich, *supra* note 101, at 399. *But cf.* the assertion following that "communist morality and communist customs will stand in place of law," and that "it is custom (side by side with morality) that will regulate socialist relationship in place of law." *Id.* at 382-83. Custom implies continuing social pressure by the overwhelming majority against deviation from a social norm, whereas becoming accustomed implies internal habituation of the individual. Morality implies individual obligation but not habituation. Apparently, Golunskii and Strogovich expect custom and morality, as well as habituation, to function as controls in communist society.

¹⁴¹Shaknazarov, *When the State Has Withered Away*, 1 SOVIET REV. 54, 60-61 (1960).

¹⁴²*Id.* at 62.

¹⁴³Denisov, *On the Relationship of State and Society in the Period of Transition from Capitalism to Communism*, 12 CURRENT DIGEST OF THE SOVIET PRESS, No. 22, at 17, 19 (1960).

society toward communism requires steady intensification of educational work among the people and the creation of conditions that will make the observance of rules and regulations become a human habit, and work a vital human necessity."¹⁴⁴ One explanation of the replacement of compulsion by habituation after a process of re-education is the following:

In socialist society compulsion . . . remains an important means of eradicating crime. Later on, of course every citizen will observe the laws [sic] voluntarily, out of deep inner conviction and awareness of moral duty, by force of habit.¹⁴⁵ But until they do, the state must uphold law and order by applying compulsion. It now becomes a matter not of rejecting compulsion but of gradually narrowing the sphere of its application, spearheading punitive measures against imperialist agents, confirmed criminals, dangerous recidivists and others who do not lend themselves to re-education.¹⁴⁶

The 1961 New Program of the Communist Party announced that in communistic society rules will be a need and a habit for everyone,¹⁴⁷ and the duty to labor will become a habit too.¹⁴⁸ Finally, P. S. Romashkin observed that "the conscious and voluntary observance of the rules of socialist community—already second nature to most Soviet people—must become a habit with all members of society, making compulsion by the state superfluous."¹⁴⁹ He concluded that one of the necessary requisites of the emergence of the conditions necessary for communism is observance of the rules of the communist way of life as a matter of habit.¹⁵⁰

¹⁴⁴Klyenov, *Public Participation in Settling Labor Disputes*, 2 SOVIET REV. 34 (1961).

¹⁴⁵On the relation of morality and habituation, see note 140 *supra*.

¹⁴⁶Mironov, *Persuasion and Compulsion in Combatting Anti-Social Acts*, 2 SOVIET REV. 54, 61 (1961).

¹⁴⁷Communist Party of the Soviet Union, *The New Program of the Communist Party in the Soviet Union*, in ESSENTIAL WORKS OF MARXISM 371, 458 (A. Mendell ed. 1961).

¹⁴⁸*Id.* at 466.

¹⁴⁹Romashkin, *The Soviet State and Law at the Contemporary Stage*, in FUNDAMENTALS OF SOVIET LAW 7, 14 (P. Romashkin ed. n.d.).

¹⁵⁰*Id.*

Though the materials of Soviet jurisprudence are scattered, fragmentary, and sometimes obscure, the foregoing reveals a relatively consistent viewpoint concerning the major role of Socialist law. Socialist legal institutions are to induce habits by which socialist man is to become accustomed to the observation of social norms required by communism. The Communist Party determines the specific norms necessary for the continuing administration of things in communism. Through a process of education, utilizing socialist legal institutions, man is to become habituated to these norms so that he will conform to them without any compulsion. State and law then wither away to achieve the ultimate goal, communism.

II. AUTHORITARIAN EDUCATION VERSUS RULE OF LAW AS A CRITICAL STANDPOINT

Criticism of Soviet jurisprudence doctrines is aided by a clear understanding of the process of authoritarian education and its implications for the rule of law. Since the role of socialist law in Soviet jurisprudence is frankly educational, modern educational theory furnishes a theoretical framework within which to appraise Marxist doctrine. First, to speak of the educational role of law is to imply something more than mere conditioning or training. Training involves simple responses to external stimuli without the element of meaning to connect one external stimulus with a similar one; education, on the other hand, requires some mental act on the part of the recipient of the stimulus. This distinction has been explained as follows:

The difference between an adjustment to a physical stimulus and a *mental* act is that the latter involves responses to a thing in its *meaning*; the former does not In both types of responsive adjustment, our activities are directed or controlled. But in the merely blind response, direction is also blind. There may be training, but there is no education.¹⁵¹

Legal processes are too complex, and their contacts with citizens too tenuous, to be characterized as simple stimulus-response training.¹⁵² Hence, if law is to change people it must do so by some

¹⁵¹J. DEWEY, DEMOCRACY AND EDUCATION 29 (1966).

¹⁵²*Cf.* S. NAGEL, THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE 5-11 (1969).

kind of educational process. One type, called habituation,¹⁵³ results when the person educated merely adjusts to the educational stimuli and does not affect the educational process.¹⁵⁴ The student in this unidirectional process does not acquire new active mental habits.¹⁵⁵ Education of the interactive type, on the other hand, creates habits in the student which involve some active use by him of his surroundings¹⁵⁶ and some mental growth as a result of this interaction.¹⁵⁷ The process of mental growth induced by education, however, may be arrested at some point by routinized habits, which put an end to plasticity and mark the close of the power to vary.¹⁵⁸ Thus, education is more than mere conditioning or training and may include the unidirectional process of habituation through mental acts, as well as the interactive process of creating active habits which may or may not become routinized.¹⁵⁹

Three broad types of education have been distinguished. One philosopher of education delineated them as educational authoritarianism, educational laissez faire, and educational experimentalism.¹⁶⁰

¹⁵³J. DEWEY, *supra* note 151, at 47.

¹⁵⁴Sometimes education is thought of as "the acquisition of those habits that effect an adjustment of an individual to his environment." *Id.* at 46.

¹⁵⁵*Id.* at 47.

¹⁵⁶*Id.*

¹⁵⁷*Id.* at 53, maintained that "growth is the characteristic of life, [and] education is all one with growing."

¹⁵⁸*Id.* at 49.

¹⁵⁹*Id.* at 76. The conclusion in the text agrees partially with J. DEWEY, *supra* note 151, at 76, that education is "that reconstruction or reorganization of experience which adds to the meaning of experience," but excludes the qualification that education must increase the "ability to direct the course of subsequent experience." *Id.* More apposite is the comment of Wynne that education "includes all activities that influence subsequent conduct in either desirable or undesirable ways." J. WYNNE, *PHILOSOPHIES OF EDUCATION FROM THE STANDPOINT OF EXPERIMENTATION* 1 (1947).

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First, of the people who are interested in education, many are primarily interested in the maintenance and extension of order and authority. Since some of these seek such ends through external dictation and imposition, their position may probably be designated as *educational authoritarianism*. Second, there are always people who are primarily interested in the maintenance and extension of in-

Educational authoritarianism signifies the attitude assumed by all those who think, and act as though education were determined in all important respects by influences outside the individual, as well as by those who deliberately defend and support theories that justify such external control and direction.¹⁶¹

Educational laissez faire signifies the attitude assumed by all those who think, feel, and act as though education were determined in all important aspects by factors inherent within individuals themselves, as well as by all those who consciously defend and support theories that justify the direct expression, development, and realization of individual propensities.¹⁶²

[From the point of view of educational experimentalism], education does not get its direction from the environment in isolation from the individual or from the individual in isolation from the environment. It gets its direction from factors that arise within experiences in which both the individual and the environment are functionally combined.¹⁶³

dividual freedom. Since some of this group seek these ends through direct self-development, expansion, or expression of the powers of the individual as they are prior to experience, their position may properly be designated as *educational laissez faire*. Third, there are those who reject, not only the extremes of educational authoritarianism and educational laissez faire, but any eclectic or middle-of-the-road position which seeks a compromise between them. They find their standards neither in external authority nor in the individual apart from experience, but in experience itself. Since those who adopt this attitude toward desirable experience—education—in recent years have been given the intellectual support of the movement in philosophy now usually called experimentalism, their position may properly be designated as *educational experimentalism*.

J. WYNNE, *supra* note 159, at v.

¹⁶¹*Id.* at 4.

¹⁶²*Id.* at 5.

¹⁶³*Id.* at 7. Educational experimentalism could have been called interactive education.

Other philosophers of education have developed similar categories, though not so clearly as those set out in the text. Professor Dewey distinguished (1) "formation from without," (2) "recapitulation and retrospection" and the "unfolding of latent powers from within," and (3) "reconstruction" as

Such an analysis of the three basic educational processes aids in revealing those primary attributes of authoritarian education which distinguish it from the other processes. The relation of authoritarian teacher to student involves external dictation and imposition, formation by a superior from without by means of indoctrination to mold the student to conform to the model in the

"a constant reorganizing or reconstructing of experience." J. DEWEY, *supra* note 151, at 69-80. These terms are redolent of authoritarian education, laissez faire education, and experimentalism, respectively. Professor Hook limited educational philosophies to two types. He described the first, authoritarian education, as follows:

We shall therefore call those tendencies in education authoritarian, which, by blocking the roads of inquiry, prevent freedom of intellectual choice; which, by discouraging critical participation in the processes of learning, obstruct individual growth; which, by imposing dogmas of doctrine or program, blind students to relevant alternatives and encourage conformity rather than diversity; which, in short, fail to recognize that the supreme and ultimate authority, the final validating source of all other authorities in human experience is the self-critical authority of critical method—or intelligence.

Hook, *The Danger of Authoritarian Attitudes in Education*, in ISSUES IN EDUCATION 116, 117 (B. Johnson ed. 1964).

In contrast, Professor Hook described the second educational philosophy, the liberal democratic type, as follows: "Roughly speaking . . . we may say that the pervasive ideal of democratic education—or liberal education today—is to achieve a community of persons who, on the basis of reliable knowledge about themselves and the world in which they live, can develop freely in a free society." *Id.* Similarly, Professor Kallen contrasted laissez faire education, often called *libra examen*, and educational authoritarianism, which he described as follows:

In the history of teaching, such words as "indoctrination," "instruction," "inculcation" give away the persistent relation of teacher to pupil, of adult to child. It is a relation of superior to inferior power, of hardness to plasticity, of authority to dependence. The primary activities upon which the later meanings of the words are variations, are activities of building in, stamping in, talking in. . . . [C]ommonly the doctrines of the inculcators are presented as self-evident ineluctable truths. But it must be obvious that if they were such, indoctrination would be unnecessary. If indoctrination is necessary, the doctrines can be neither self-evident, nor ineluctable.

H. KALLEN, *THE EDUCATION OF FREE MEN* 149 (1949). For another view of educational authoritarianism, see C. LEWIS, *THE ABOLITION OF MAN* 38-41 (1947), which maintained that "the man moulders," who will eventually be able to "cut out all posterity in what shape they please," will finally prove to be the "abolition of man."

mind of the teacher. The teacher, as superior or molder, necessarily recognizes no right in the student to resist or modify the molding. As John Dewey observes, the philosophy of authoritarian education "is eloquent about the duty of the teacher in instructing pupils; it is almost silent regarding the privilege of learning,"¹⁶⁴ or, one may add, of not learning.

Using law in an authoritarian educational process carries important implications for traditional rights associated with the rule of law. Much misunderstanding results from failure to distinguish clearly three fundamental clusters of ideas intermingled in rule of law doctrine. The first focuses on the form of legal rules without regard to their procedural or substantive content. It specifies that law consists of general rules and not specific dispositions of particular cases. Preference for a government of laws over a government of men traditionally has expressed this aspect of the rule of law.¹⁶⁵ The truth figuratively expressed in this formula, however, should not be obscured by a literal interpretation; any government of laws must utilize men.¹⁶⁶ Never-

¹⁶⁴J. DEWEY, *supra* note 151, at 71.

¹⁶⁵Aristotle, *Politica*, in 10 THE WORKS OF ARISTOTLE § 1287a (W. Ross ed. B. Jowett transl. 1921), observed: "The rule of law, it is argued, is preferable to that of any individual." J. HARRINGTON, *The Commonwealth of Oceana*, in THE POLITICAL WRITINGS OF JAMES HARRINGTON 33, 41 (C. Blitzer ed. 1955), stated that government "is the empire of laws and not of men." D. HUME, *Of Civil Liberty*, in DAVID HUME'S POLITICAL ESSAYS 101, 106 (C. Hendel ed. 1953), affirmed of modern "civilized monarchies what was formerly said in praise of republics alone, that they are a government of laws, not of men." The first Massachusetts Bill of Rights provided:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

MASS. CONST. BILL OF RIGHTS pt. I, art. XXX (1780), in DOCUMENTS OF AMERICAN HISTORY 107, 110 (3d ed. H. Commager ed. 1943). "The definition of good government as government by laws rather than by men has been a commonplace in Western political thought since the time of Aristotle." Blitzer, *Editorial Note* to THE POLITICAL WRITINGS OF JAMES HARRINGTON 41 n.2 (C. Blitzer ed. 1955).

¹⁶⁶K. DAVIS, *DISCRETIONARY JUSTICE* 17 (1969), correctly observed that "[e]very government has always been a government of laws and of men." W. GELLHORN, *OMBUDSMAN AND OTHERS* 438 (1966), commented that the ideal of government of laws and not of men "expresses utter silliness when

theless, expression in the form of general rules is one of the first requirements for laws.¹⁶⁷ Paradoxically, this requirement is not met if rules are too general, as in the case of general clauses which merely mask administrative measures taken under them.¹⁶⁸ Nor are there laws if rules are too specific, as in private legislation¹⁶⁹ and the judgment of a court in a particular case.¹⁷⁰ Obviously the

taken to mean that men are not the central ingredient of good government." E. PATTERSON, JURISPRUDENCE 101 (1953), found this literal ideal unattainable because self-contradictory, adding "laws without officials would be prescriptions with no pharmacist to fill them."

¹⁶⁷H. HART, THE CONCEPT OF LAW 21 (1961), required laws to be general with respect to the acts described and the persons subject to them. "[T]he quality of equal application of the rule to all persons within its scope is an attribute of every rule which is duly enforced" J. STONE, HUMAN LAW AND HUMAN JUSTICE 102 (1965). Accord, Neumann, *The Concept of Political Freedom*, 53 COLUM. L. REV. 901, 906 (1953). E. PATTERSON, *supra* note 166, at 97, considered "the generality of law . . . its most important characteristic." See generally *id.* 97-116; E. BODENHEIMER, JURISPRUDENCE 168-73 (1967). For a discussion of the conflict between general rules of law and administration, see Funk, *Pure Jurimetrics: The Measurement of Law in Decision-Regulations*, 34 U. PITT. L. REV. 375, 417-20 (1973). As Professor Patterson explained:

The generality of a proposition depends upon the generality of its terms (or of at least one of its terms). A proposition of law is general because its terms refer to an indefinite number of individual instances, in contrast with a term which refers to an individual instance or a definite number of individual instances.

E. PATTERSON, *supra* note 166, at 110. Cf. *id.* at 97. W. FRIEDMANN, THE STATE AND THE RULE IN A MIXED ECONOMY 94 (1971), concluded that "[i]n a formal sense, the rule of law means any ordered structure of norms set and enforced by an authority in a given community."

¹⁶⁸See, e.g., W. FRIEDMANN, LEGAL THEORY 333 (5th ed. 1967); R. SCHLESINGER, COMPARATIVE LAW 344-91 (2d ed. 1959); Neumann, *The Change in the Function of Law in Modern Society*, in THE DEMOCRATIC AND THE AUTHORITARIAN STATE 22, 29 (1964); Rümelin, *Developments in Legal Theory and Teaching During My Lifetime*, in THE JURISPRUDENCE OF INTERESTS 1, 17 (M. Schoch ed. 1948). Of course, general clauses may become more specific through administrative regulations or judicial interpretation, and this is common with broad principles of constitutional law.

¹⁶⁹See, e.g., E. PATTERSON, *supra* note 166, at 112-13.

¹⁷⁰*Id.* at 113. J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 21 (1965), considered the command of the judge to be "occasional or particular, . . . [f]or he orders a specific punishment, as the consequence of a specific offense."

generality requirement for law is a matter of degree.¹⁷¹ Thus, this aspect of the rule of law does not eliminate discretion altogether but circumscribes it¹⁷² with rules to which private citizens, as well as other departments of government,¹⁷³ can appeal.¹⁷⁴

Rule of law doctrine extends beyond the formal requirement of generality for laws to some prescriptions of content. A second cluster of ideas requires legal institutions to operate under procedural rules fundamentally fair to the citizens subject to them.¹⁷⁵ This is the Anglo-American requirement of due process

¹⁷¹W. JENNINGS, *THE LAW AND THE CONSTITUTION* 282 (1959). The rule of law and discretion are conceptual opposites, like philosophic rationalism and empiricism or the nomothetic-ideographic dichotomy. On the former, see M. COHEN, *LAW AND THE SOCIAL ORDER* 263-67 (1967). On the latter, see 7 F. COPLESTON, *A HISTORY OF PHILOSOPHY*, pt. II, at 138 (1965); E. NAGEL, *THE STRUCTURE OF SCIENCE* 548 (1961). Despite this conceptual dichotomy, particular instances may be arranged in series according to the degree to which they satisfy one or the other of these concepts. K. DAVIS, *supra* note 166, at v; Goodheart, *The Rule of Law and Absolute Sovereignty*, 106 U. PA. L. REV. 943, 949 (1958).

¹⁷²As Radbruch observed, "[T]he natural law rule that whoever at the time holds power has the right to enact law is inseparable from the other natural law rule that that holder of power is bound by his own laws." G. RADBRUCH, *supra* note 1, at 205. Within the core of generally accepted meanings of law various interpretations are possible, but legal norms serve as a "frame" controlling the limits of interpretation. H. KELSON, *PURE THEORY OF LAW* 351 (1967). Thus, the possibility of court interpretation is limited by legislation to "a sphere of small diameter." W. JENNINGS, *supra* note 171, at 254. Rule skeptics may question the size of the sphere in practice, but should admit some circumscription nonetheless. W. RUMBLE, JR., *AMERICAN LEGAL REALISM* 95-103 (1968).

¹⁷³The American doctrines of balance of powers and judicial supremacy may be compared with the German *Rechtsstaat*, "viz., the principle that the judicial power is subordinate to the legislative power." Rümelin, *supra* note 168, at 20.

¹⁷⁴"The heart of the [rule of law] doctrine seems . . . to lie in the recognition by those in power that their power is wielded and tolerated only subject to the restraints of shared socio-ethical convictions." J. STONE, *SOCIAL DIMENSIONS OF LAW AND JUSTICE* 619-20 (1966). "The generality of law is an important means of protecting the individual against official partiality and oppression." E. PATTERSON, *supra* note 166, at 102. Cf. G. RADBRUCH, *supra* note 1, at 206, "that law, while *class* law, is indeed *class law*, since it presents the interest of the ruling class not naked but in the garb of law, and since the form of law, no matter what the legal content, always, indeed, serves the suppressed."

¹⁷⁵This aspect of rule of law doctrine is the rule of law in the "narrow" or "lawyer's sense." See D. LLOYD, *THE IDEA OF LAW* 162 (1964); J. STONE,

of law.¹⁷⁶ Whether in the ordinary courts or administrative agencies,¹⁷⁷ the procedural content of the rule of law guarantees, at

supra note 167, at 104. In this sense "the rule of law is the machinery by which effect can be given to such basic rights as are recognized in any legal system." Goodheart, *supra* note 171, at 943. "By procedural rules I mean those rules which establish how those who hold the legislative power are determined and what steps they must follow in exercising this power, while the substantive rules are concerned with the subject matter which can be dealt with by the legislative body." *Id.* at 951. *Cf.* Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 151 (1958), that "[a]lthough I, too, think of the concept [of the rule of law] as a primarily procedural one, I am by no means sure that a meaningful rule of law has nothing whatever to say concerning the substantive content of legally enforced principles."

¹⁷⁶D. LLOYD, *supra* note 175, at 162, defined "due process" as follows:

This involves all such matters as ensuring the independence of the judiciary; providing for the speedy and fair trial of accused persons and for adequate judicial control over police and police methods of securing confessions from accused persons; providing adequate safeguards regarding arrest and detention pending trial; and providing adequate legal aid for those whose financial resources are not sufficient to obtain suitable legal defense. Moreover, since the rights of the individual here squarely confront those of the state, the accused must be entitled to refuse to make any statement which is calculated to incriminate himself, and those charged with the duty of advocacy must be free and independent and not subject to state pressure. Nor must the advocate be regarded as in any way an agent of the state itself or one whose duty is not so much to his client but to the administration of justice, as personified by the state

As Jones, *supra* note 175, at 145, saw it:

The rule of law is a tradition of decision, a tradition embodying at least three indispensable elements: *first*, that every person whose interests will be affected by a judicial or administrative decision has the right to a meaningful "day in court"

¹⁷⁷To A.V. Dicey the rule of law meant that each citizen was amenable to the jurisdiction of "the ordinary tribunals," *i.e.*, courts rather than administrative agencies. A. DICEY, *INTRODUCTION TO THE STUDY OF THE CONSTITUTION* 193 & ch. XIII (10th ed. 1959). This distinction has been characterized as "not fundamental," "no longer acceptable" and "nonsense." *See* Wade, *Introduction to A. DICEY, supra*, at civ; W. FRIEDMAN, *LAW IN A CHANGING SOCIETY* 501 (2d ed. 1972); O'Toole, Book Review, 53 GEO. L.J. 854, 857 n.11 (1965). In Pound, *The Rule of Law and the Modern Social Welfare State*, 7 VAND. L. REV. 1, 30 (1953), on the other hand, the judicial and administrative processes are treated as "characteristically distinct." Dean Pound claimed:

Four features of administrative justice are continually in evidence. One is a tendency to decide in advance of hearing and without

least, minimum rights to the weak to be heard effectively.¹⁷⁸ Like cases are to be treated alike procedurally, and unlike cases are to be treated differently; but with respect to procedure most cases are alike.¹⁷⁹

Thirdly, rule of law has a substantive aspect. Again, like cases are to be treated alike and different cases differently, but most substantive rules emphasize unlike cases and different results.¹⁸⁰ The search for substantive rule of law standards, governing the division of cases into appropriate categories, is analogous to the search for specific content in natural law doctrines¹⁸¹

hearing both sides, using the hearing when required by statute, as little more than a technical formal requirement. Second, there is a tendency to consult one side or hear statements or arguments from one side with no opportunity to refute accorded to the other. Third, action is taken upon grounds of which the party adversely affected has no notice and no opportunity to explain or refute Fourth, a serious feature of administrative justice is entrapment of individuals by advice and information given by officers, subordinates and local officials of the administrative agency and repudiated after allowing it to be acted on in good faith.

Id. Cf. F. HAYEK, *THE ROAD TO SERFDOM* 72-87 (1944). With the growth of state and federal administrative procedure acts in the United States, the validity of these criticisms today is problematical. As W. JENNINGS, *supra* note 171, at 313, observed, "administrative courts are as 'ordinary' as the civil courts" and what matters is their independence of administrative influence and control in fact.

¹⁷⁸F. NEUMANN, *BEHEMOTH* 451 (1966).

¹⁷⁹Cf. J. STONE, *supra* note 167, at 140, that "even within this narrow compass . . . no absolute indentification of equal liberty with justice is possible. Justice may still be thwarted by *de facto* inequality between the parties in their respective skills and resources in using the procedure for harassment, delay or attrition of the opponent."

¹⁸⁰As W. JENNINGS, *supra* note 171, at 311-12, put it:

"[E]quality before the law" in its most obvious sense means an equality of rights and duties. In this sense there is no equality. Pawnbrokers, money-lenders, landlords, drivers of motor-cars, infants, married women, and indeed most other classes, have special rights and duties. Nor is it possible to affirm that equality exists because any person can legally join one of these classes. A man cannot become a married woman or an infant; nor can anyone become a licensee of a public-house or a film exhibitor without the consent of someone else.

¹⁸¹W. FRIEDMANN, *supra* note 177, at 500-501, commented that "to give the 'rule of law' concept a universally acceptable ideological content is as

or ideas of justice.¹⁸² The touchstone is that inequalities in substantive rules "shall be inequalities of function and service but shall not be derived from arbitrary distinctions based on race, religion or other personal attributes."¹⁸³

Opinions may differ with respect to each aspect of rule of law doctrine developed above—its formal requirements and its procedural and substantive content. Nevertheless, there is a common element pervading all three aspects, regardless of individual differences concerning specific applications. Throughout, the rule of law doctrine provides an extragovernmental standard by which

difficult as to achieve the same for 'natural law.' In fact, the two concepts converge." As Jones, *supra* note 175, at 151, put it:

. . . I am by no means sure that a meaningful rule of law has nothing whatever to say concerning the substantive content of legally enforced principles. A good case can be made that the concepts of the rule of law and of natural law are at least fraternal twins; I would not foreclose the possibility that they may be identical twins.

Cf. Neumann, *supra* note 167, at 906, that "[t]he generality of the law may . . . be called secularized natural law."

¹⁸²J. STONE, *supra* note 174, at 620 n.82b, referred to the substantive content of the rule of law as its "justice-reference." This is "the socioethical as distinct from [the] lawyers' law component in 'the rule of law'" *Id.* at 625 n.101. "[T]he ideal of 'the rule of law,' long worshipped in blind faith, is recognized as fruitful only if it says something intelligible about the justice embodied in 'the law.'" J. STONE, *LEGAL SYSTEM AND LAWYERS' REASONINGS* 12 (1964).

¹⁸³W. FRIEDMANN, *THE PLANNED STATE AND THE RULE OF LAW* 8 (1948); W. FRIEDMANN, *supra* note 177, at 503. J. STONE, *supra* note 167, at 102 made a similar point as follows:

The unjust might . . . be definable as "inequality without intrinsic differences." Arbitrariness on this head would consist in failing to apply equally to all members of society who *as regards the reason* (or *purpose* or *policy* or *end*) of that law are similarly situated; or, in other words, all laws would have to apply equally to all human beings unless there is good reason to the contrary.

To Western liberals the ultimate justification of substantive distinctions is the worth of the individual human being. For example, the basic value of W. FRIEDMANN, *supra* note 177, at 524, is "the fullest provision by the community of the conditions that enable the individual to develop into a morally and intellectually responsible person." This includes equality, liberty and democracy. *Id.* at 502, 503, 505. J. STONE, *supra* note 167, at 102 n.120, concluded that "the transcending principle thus governing both the areas of just equalities and just inequalities becomes the individual human life as an end in itself, 'human worth' as such regardless of 'merit.'"

the governed may judge the governors. The rule of law sets individual rights against state power.¹⁸⁴ Requirements of generality rather than specific decrees, procedural fairness, and reasonable justification of substantive differences may be utilized by one power-holder against another. More significantly, however, these doctrines may be utilized by the individual citizen against the entire governing group. This creates a theoretical conflict between the use of law in a program of authoritarian education and the rule of law. Authoritarian education involves external dictation from outside the individual, forming him, preventing free choice and individual growth, and indoctrinating him according to the will of the educator. The relation of teacher and pupil in this process can only be that of superior and inferior. There can be no standards in such a program to protect the individual who does not wish to be educated.

The implications for Soviet jurisprudence are clear; if law is used in the program of authoritarian education outlined in the Marxist-Soviet classics, the specific legal institutions chosen to carry out this program are bound to conflict with the rule of law. In fact, the course of contemporary Soviet jurisprudence demonstrates this choice and this conflict and finally reveals the theoretical impossibility of the entire Soviet program for socialist law.

III. THE CONFLICT EXEMPLIFIED IN SPECIFIC SOVIET LEGAL INSTITUTIONS

Soviet jurists point to various legal institutions and procedures as specific examples of the educational role of socialist law in practice. One is the influence which a Soviet judge as teacher exerts on the accused during a criminal trial. The court is said to exercise the greatest possible influence on those who are called to a reckoning before it.¹⁸⁵ The claim is that the educational influence of the court on an accused is immense¹⁸⁶ and that the court directly influences defendants even in civil cases.¹⁸⁷

¹⁸⁴Jones, *supra* note 175, at 145, observed that "the rule of law's great purpose is protection of the individual against state power-holders."

¹⁸⁵I. GOLYAKOV, *supra* note 112, at 17.

¹⁸⁶Gusev, *supra* note 131, at 21.

¹⁸⁷Gorshenin, *The Soviet Court and Its Role in Strengthening Soviet Law*, 7 CURRENT DIGEST OF THE SOVIET PRESS, No. 7, at 18, 22 (1955).

The "teaching sentence" is a second specific mechanism by which Soviet legal institutions are said to fulfill their educational role. A Soviet jurist explained:

When the court individualizes penalties depending on the criminal's personality, when, after a public court hearing and a public reading of the sentence, all those present clearly understand why the court has chosen this particular measure of punishment, then peoples' faith in the administration of justice grows stronger. They begin to place a higher value on a conscientious attitude toward labor, on respectable behavior in society and on their place in the collective.¹⁸⁸

A third instance of education by specific Soviet legal institutions is an increased use of criminal trials as object lessons to the rest of society. Trials are to be conducted according to the following principles:

Trying the case in great detail, strictly observing the law, the court step by step discloses the whole picture of the crime or the civil dispute. It raises the explanations of the parties to a higher level, transforming the whole trial not into a spectacle, like the selfish bourgeois court does, but into a serious instructive school for educating those attending the session to observe and respect the laws and justice.

"We are taking it too little into account," said M. I. Kalinin in a speech on the tenth anniversary of the Supreme Court of the USSR, "*that the court has the greatest possible influence both on those who are called to a reckoning and upon those who merely attend the sessions.*"

¹⁸⁸Starodubsky, *Only Through the Court*, 17 CURRENT DIGEST OF THE SOVIET PRESS, No. 36, at 17 (1965). Cf. Kulikov, *Enhancing the Educational Role of Socialist Justice and Reinforcing Legality in the Activities of Judicial Agencies*, 2 SOVIET LAW AND GOVERNMENT 33, 34 (1964), as follows:

All court activity does not have an educative effect—only that which rests upon strict observance of legality in the activities of the courts, realization of the principle of the equality of all citizens before the law and the courts, and adherence to the requirement that court decisions be just, that is, severe with respect to malicious criminals, but lenient toward the individual who has accidentally strayed.

The judge who directs the case well, skillfully, and in a Party manner, is also always able to secure a good audience. People will come to listen to him, to learn from him." The court is then transformed into an instrument of propaganda for Soviet law and the just foundations of our life; it teaches people how to live, work, and behave under the conditions of Soviet society.¹⁸⁹

Another Soviet jurist explained that:

[E]ach case of application (in the broad sense of this word) of the norms of socialist law can and must be employed not only to regulate the particular concrete situation in accordance with the requirements of the law, but also for its educative effect upon the people affected by this situation or aware of it.¹⁹⁰

Some even advocate using the trial setting as a forum for government propaganda. For example, it is said that:

The prosecutor's rostrum often turns into a political rostrum. "The prosecutor in the court," writes Academician A. Ya. Vyshinsky, "is an agitator and propagandist in the interests of the Soviet regime. This determines the significance of the Soviet prosecution in the courts as a means of mass political-educational work."¹⁹¹

Others call for the increased use of speeches of public accusers and defenders during trials, apparently to point up the issues involved, in order to increase the educational effect on those hearing them.¹⁹² Thus, it is claimed that the trial itself, if properly explained, may serve as an educative example to the public.

¹⁸⁹I. GOLYAKOV, *supra* note 112, at 17.

¹⁹⁰Golunsky, *The Creative Revolutionary Role of Socialist Law in the Period of the Comprehensive Building of Communism*, 1 SOVIET LAW AND GOVERNMENT 13, 22 (1961).

¹⁹¹Polyansky, *supra* note 117, at 10.

¹⁹²Izvestia, *U.S.S.R. Supreme Court, Plenary Session*, 14 CURRENT DIGEST OF THE SOVIET PRESS, No. 20, at 22-23 (1962); U.S.S.R. Supreme Soviet, Legislative Proposals Committees of the Council of the Union and the Council of Nationalities, *Draft: Law on Increasing the Role of the Public in Combating Violations of Soviet Laws and the Rules of Socialist Society*, 11 CURRENT DIGEST OF THE SOVIET PRESS, No. 43, at 13, 14 (1959); U.S.S.R. Supreme Court, Plenum, *Decree No. 3, June 19, 1959, On the Application*

Finally the comrades' court system is described as a new legal institution, educating citizens in preparation for the withering away of the state and law. The objective is to bring public influence to bear on a criminal offender to reform him so he will not violate social norms again. Thus, the criminal element in Soviet society is to be permanently reduced and, eventually, totally eliminated. Then all members of society, presumably, will conform to socialist social norms, and the coercion of state and law will no longer be necessary. The Russian Republic Supreme Court alluded to this argument in discussing the changes and additions aimed at improving the work of the comrades' courts in the communist upbringing of the working people.¹⁹³ One Soviet jurist claimed that in many instances the public, in a comradely court, exerts a much stronger influence on a wrongdoer than a people's court trial would.¹⁹⁴ The fact that a defendant frequently asks for the transfer of his case from the comrades' court to the people's court has been said to show graphically the great educational importance of comrades' courts and public influence.¹⁹⁵ It is said that comrades' courts should use warnings, public censure, and public apologies as specific measures of influence,¹⁹⁶ and, when a criminal can be reformed by measures of public influence, the case is to be transferred to the comrades' courts.¹⁹⁷

of Measures of Criminal Punishment by the Courts, 11 CURRENT DIGEST OF THE SOVIET PRESS, No. 41, at 14, 15 (1959); Berman, *supra* note 125, at 138.

¹⁹³Russian Republic Supreme Court Presidium, *What Is New In Work of Comrades' Courts*, 15 CURRENT DIGEST OF THE SOVIET PRESS, No. 43, at 29 (1963).

¹⁹⁴Anashkin, *Concerning Public Courts*, 8 CURRENT DIGEST OF THE SOVIET PRESS, No. 50, at 27 (1956).

¹⁹⁵Gutsenko, Dobrovolskaya & Raginsky, *supra* note 130, at 21.

¹⁹⁶*Id.* at 22. These authors also applied the term "measures of influence," to fines and restitution for damages.

¹⁹⁷Karev, *Criminal Procedure*, in FUNDAMENTALS OF SOVIET LAW 443, 446 (P. Romashkin ed. n.d.), which suggests as an alternative, however, transfer to a commission for minors. On the work of this social agency *cum* juvenile court, see, e.g., U.S.S.R. Supreme Soviet, Legislative Proposals Committees of the Council of the Union and the Council of Nationalities, *Draft: Model Statute On Commissions For Cases Involving Minors*, 11 CURRENT DIGEST OF THE SOVIET PRESS, No. 43, at 17-18 (1959). Cf. Min'kovskii, *The Special Features of Examining Cases of Crimes of Minors*, in THE SOVIET LEGAL SYSTEM, pt. I, at 109-11 (J. Hazard & I. Shapiro eds. 1962). Paradoxically,

These legal institutions are considered an effective form of moral influence upon violators of the rules of the socialist community.¹⁹⁸ In one collective it was observed that by degrees the comrades' court began to acquire greater weight and authority in the collective as people became convinced that measures of public influence had a stronger effect on violators of labor discipline than disciplinary fines.¹⁹⁹ A comrades' court is considered the court of public conscience,²⁰⁰ so failure to transfer petty hooligan cases to it becomes a clear underestimation of the educative influence of public opinion.²⁰¹

this parental use of law in a nearly literal sense is part of the childhood socialization process whereby children are taught to assume their adult roles, and thus differs from the educational function of law in changing adult citizens. Nevertheless, the Soviet jurisprudential doctrine of the educational function of socialist law in socializing adults in preparation for communism may be considered a type of socialization after childhood. *See generally* R. DAWSON & K. PREWITT, *POLITICAL SOCIALIZATION* (1969); O. BRIM, JR., & S. WHEELER, *SOCIALIZATION AFTER CHILDHOOD* (1966); T. PARSONS, *THE SOCIAL SYSTEM* 201-48 (1964); Parsons, Shils & Olds, *Values, Motives, and Systems of Action*, in *TOWARD A GENERAL THEORY OF ACTION* 45, 223-33 (T. Parsons & E. Shils eds. 1962).

¹⁹⁸Mironov, *Strengthen Legality and Law and Order*, 16 *CURRENT DIGEST OF THE SOVIET PRESS*, No. 19, at 17, 18 (1964).

¹⁹⁹Petrov, *From the Experience of the Work of Comrades' Courts*, in *THE SOVIET LEGAL SYSTEM*, pt. I, at 22 (J. Hazard & I. Shapiro eds. 1962). *Accord*, Pokrovsky & Gershanov, *What Comrades' Courts Should Be Like*, 11 *CURRENT DIGEST OF THE SOVIET PRESS*, No. 14, at 24, 25 (1959); Shomorov, *Is This a Private Affair?*, 12 *CURRENT DIGEST OF THE SOVIET PRESS*, No. 30, at 30, 31 (1960); Tikhunov, *There Will Be No Indulgence For Hooligans*, 18 *CURRENT DIGEST OF THE SOVIET PRESS*, No. 16, at 45 (1966).

²⁰⁰Mironov, *supra* note 198, at 18.

²⁰¹Sovetskaya yustitsia, *A New Stage in the Functioning of the Comrade's Courts*, 3 *SOVIET LAW AND GOVERNMENT* 35 (1964).

An argument could be made that reliance on public influence in the comrades' courts deprives them of essential qualities of legal institutions, since they rely partially on social sanctions, such as public apology, warning and public censure. H. BERMAN, *supra* note 4, at 289. Comrades' courts, on the other hand, may impose fines up to ten rubles, propose job transfer, demotion, or eviction from living quarters, and require payment of damages up to fifty rubles. *Id.* at 290. *Statute on Comrades' Courts, July 3, 1961*, in *THE SOVIET LEGAL SYSTEM*, pt. I, at 17-21 (J. Hazard & I. Shapiro eds. 1962). Admittedly, comrades' courts rely exclusively on lay judges, though this is not unknown in the Soviet Union and elsewhere. Joras, *The Soviet Judge and the American Judge*, 5 *BAYLOR L. REV.* 18, 25 (1952), observed that the ordinary Soviet judge "is not required by statute to be a trained

Soviet jurists readily admit that the process in which these specific legal institutions and procedures²⁰² are being employed is

lawyer, and the majority of Soviet judges do not possess the qualifications of legal training." H. BERMAN, *supra* note 4, at 300, estimated that in the 1949 election of peoples' court judges, "[a]pparently at least 30 per cent, and probably more, had no legal education." In the 1957 election, however, "[n]early all had either higher or intermediate legal education." *Id. Accord*, Hager, *Soviet Legal Education*, 5 DUQUESNE U.L. REV. 143, 145 (1966). On the European experience, see J. DAWSON, *A HISTORY OF LAY JUDGES* (1960). On balance, therefore, comrades' courts may be considered legal institutions, though more informal than most today. See generally F. BARGHOORN, *POLITICS IN THE U.S.S.R.* 344-46 (1966); Berman & Spindler, *Soviet Comrades' Courts*, 38 WASH. L. REV. 842 (1963); O'Connor, *Soviet Procedures in Civil Decisions: A Changing Balance Between Public and Civic Systems of Public Order*, in *LAW IN THE SOVIET SOCIETY* 51, 90-92 (W. LaFave ed. 1965).

²⁰²This article examines the jurisprudential implications of using Soviet legal institutions and procedures as educators in preparing man for communism. Soviet authors sometimes rely on other institutions and procedures to perform this task. For example, peoples' volunteer militia or public order squads are said to instill proper attitudes toward law and the state. See, e.g., Shaknazarov, *supra* note 141, at 62. See generally Hildebrand, *supra* note 101, at 198-200. These organizations are a sort of auxiliary police. H. BERMAN, *supra* note 4, at 286-88. The educative effect here results from drawing many people into the police activities which these institutions perform. For present purposes these activities are considered part of law enforcement, and thus these institutions are not legal institutions in a strict sense. Second, release of criminal offenders on probation into the custody of collectives often is said to have an educative effect. See, e.g., Gorkin, *The Power of Public Influence*, 11 CURRENT DIGEST OF THE SOVIET PRESS, No. 51, at 33 (1960); Mironov, *supra* note 198, at 18; Sheinin, *Believe in Man*, 12 CURRENT DIGEST OF THE SOVIET PRESS, No. 3, at 30, 31 (1960). Sometimes this educative measure is limited to first offenders, minor offenses, those capable of reform, or minors. In any event, probation procedures involve penal institutions rather than legal institutions in the strict sense. Their educative effect probably may be investigated more profitably as penology rather than jurisprudence. The same may be said of the educative effect of particular penal procedures. See, e.g., Mironov, *supra* note 146, at 63; Shaknazarov, *supra* note 141, at 62-63, on the educational effect of corrective labor in penal institutions in preparing the prisoner for return to a productive life. Some even advocate the direct "political education" of the prisoner to reform him. See, e.g., Mironov, *supra* note 146, at 63. One Soviet jurist suggested the parole of prisoners to collectives before the expiration of their terms as an educative measure. Gorshenin, *Soviet Court Is Important Weapon for Strengthening Socialist Law*, 6 CURRENT DIGEST OF THE SOVIET PRESS, No. 45, at 12 (1954); Gorshenin, *supra* note 187, at 21. Again, these are penal measures. Sometimes an educational effect is attributed to lectures at public meetings and articles in the public press by judges and other court officials. See, e.g., Gorshenin, *supra* note 187, at 22; Prusakov, *Sovetskaya*

one of authoritarian education. The Communist Party decides how man is to be remade for communism, and Soviet man is subjected to this process. Thus, the educational use of legal institutions in changing man is characterized commonly as a process of instilling²⁰³ or inculcating²⁰⁴ new discipline and new attitudes. Mold-

Rossia Asks: What Is New In the Bar?, 14 CURRENT DIGEST OF THE SOVIET PRESS, No. 35, at 16 (1962); *Sovietskaya yustitsia, Eliminate Shortcomings in the Work of Lawyer's Collegiums*, 13 CURRENT DIGEST OF THE SOVIET PRESS, No. 18, at 8-10 (1961). The speakers are personnel of legal institutions and the speeches are often on legal topics. Nevertheless, to a Westerner, at least, these educational activities seem analogous to those of bar association speaker's bureaus, rather than those of formal legal institutions in the strict sense. Finally some Soviet jurists see simplification and propagation of the laws themselves as a significant educational measure. See, e.g., Kudriavtsev, *The June Plenum of the C.P.S.U. Central Committee and Certain Questions Concerning Scientific Organization of the Struggle Against Crime*, 2 SOVIET LAW AND GOVERNMENT 13, 19 (1963); Turnanov, *Failure to Understand or Unwillingness to Understand: (On Harold Berman's JUSTICE IN THE U.S.S.R.: AN INTERPRETATION OF SOVIET LAW)*, 3 SOVIET LAW AND GOVERNMENT 3, 8 (1965). It is perfectly proper to investigate the educative effect of legislation itself. See, e.g., Funk, *International Laws as Integrators and Measurement in Human Rights Debates*, 3 CASE W. RES. J. INT'L L. 123 (1971); Funk, *From International Laws to International Economic Community Law*, 4 CASE W. RES. J. INT'L L. 3 (1971). The present inquiry, however, is limited to the educative effect in Soviet jurisprudence of law, in the sense of strictly legal institutions and procedures.

²⁰³Khrushchev, *supra* note 121, at 11, stated "[w]e must instill a respect for Soviet laws. . . ." Kudriavtsev, *The June Plenum of the C.P.S.U. Central Committee and Certain Questions Concerning Scientific Organization of the Struggle Against Crime*, 2 SOVIET LAW AND GOVERNMENT 13, 18 (1963), maintained that "[b]y its very content, legal literature instills irreconcilability toward violators of socialist law and order, thieves, loafers and money-grubbers, and a striving for justice, moral purity, and respect for Soviet laws." Vlasov, *Administrative Law*, in FUNDAMENTALS OF SOVIET LAW 105, 113 (P. Romashkin ed. n.d.), found that "[s]ocialist legality . . . instills into the masses new socialist concepts." I. GOLYAKOV, *supra* note 112, at 20, observed that "[b]y its educational role our court can only make the strictest application of the law that will help the state to instill in our citizens the ways of communistic living." A. VISHINSKY, SOVIET LAW 13-14 (Department of Government, University of Texas transl. 1950), admitted that the aim of Soviet law is "to promote the instillation of a new line of conduct in socialist society."

²⁰⁴Glizerman, *supra* note 132, at 9, found that legal institutions "inculcate a new social discipline in the masses." Chkhikvadze, *supra* note 116, at 11, saw Soviet law "inculcating a communist attitude to work." A. DENISOV & M. KIRICHENKO, *supra* note 120, at 301, claimed that Soviet law "inculcates

ing,²⁰⁵ shaping,²⁰⁶ and refashioning²⁰⁷ the new man and embedding²⁰⁸ or rooting in²⁰⁹ the new ideas is readily admitted. Comrades' courts are said to play an indoctrinational role,²¹⁰ and Soviet law is to correct psychologically all the weaknesses inherent in what criminals have been taught.²¹¹ Courts serve as educators and propagandists of Soviet laws, if the trial is well organized and the sentence is correct.²¹² Finally, courts are to

solicitude and concern for socialist property, strict labour discipline, and honest attitudes towards their duties to the state and society and respect for the rules of socialist intercourse." Ilyichev, *Current Tasks of the Party's Ideological Work*, 15 CURRENT DIGEST OF THE SOVIET PRESS, No. 23, at 5, 10, 12 (1963), observed that Soviet law inculcates a new morality of labor discipline. Pokrovsky & Gershanov, *supra* note 199, at 25, saw comrades' courts "inculcating in citizens a respect for the laws and rules of socialist society." Sovetskoye gosudarstvo i pravo, *To Meet the 22nd Party Congress: Soviet Labor Law In the Period of the Full-Scale Building of Communism*, 13 CURRENT DIGEST OF THE SOVIET PRESS, No. 37, at 18, 20 (1961), wanted law to "inculcate a communist attitude to work." The U.S.S.R. Supreme Soviet, *supra* note 192, at art. 3, 13, described law as "contributing to the inculcation in citizens of a spirit of a communist attitude toward labor and socialist property, the observance of the rules of socialist society and a respect for the dignity and honor of citizens."

²⁰⁵Khrushchev, *On the Program of the C.P.S.U.*, 13 CURRENT DIGEST OF THE SOVIET PRESS, No. 45, at 17, 20 (1961), referred to "[t]he molding of the new man."

²⁰⁶Kommunist, *Jurisprudence Under the Conditions of the Building of Communism*, 15 CURRENT DIGEST OF THE SOVIET PRESS, No. 49, at 19, 21 (1963), found it "no less important and no less necessary to carry legal knowledge to the masses, to shape the socialist law-consciousness of the working people."

²⁰⁷A. VYSHINSKY, *supra* note 113, at 640, found that Soviet laws "are a mighty instrument for . . . refashioning human consciousness."

²⁰⁸A. VYSHINSKY, *supra* note 203, at 11, maintained that through law "esteem for the new creative principles of socialist common-living is embedded."

²⁰⁹I. GOLYAKOV, *supra* note 112, at 18, called for "the rooting into the conscience of the broad masses of a respect for law and justice."

²¹⁰Pokrovsky & Gershanov, *supra* note 199, at 25.

²¹¹A. VYSHINSKY, *supra* note 203, at 13.

²¹²I. GOLYAKOV, *supra* note 112, at 17; Gorshenin, *supra* note 187, at 22. Strogovich, *When Sentence Is Pronounced*, 18 CURRENT DIGEST OF THE SOVIET PRESS, No. 30, at 29 (1966), maintained that the trial must be conducted so that it will "actively influence public opinion, organize it and channel it in the right direction."

continue their activity aimed at influencing people who do not submit to the rules of socialist society and who resist education.²¹³ These terms clearly reveal the authoritarian bias in the Soviet legal-educational process.²¹⁴

Each specific legal institution and procedure relied on to further the educational role of socialist law tends to diminish the operation of the rule of law. In so far as a judge acts as an authoritarian lecturer, educator, or influencer of the defendant, he detracts from his role as the detached, independent adjudicator required by the rule of law. In so far as he selects sentences for individual criminal defendants to influence others in the courtroom or the general public, he departs from rules of punishment reasonably related to the offense. In so far as the particular court case is used as an object lesson or forum for propaganda, it is not being decided under preexisting rules. Finally, in so far as the Soviet legal system relies on social pressure, brought to bear by lay judges in the comrades' court system, it departs from decision by legal rules, in this instance, for lack of legal expertise

²¹³Khrushchev, *quoted in Rudenko, Intensify Struggle Against Especially Dangerous Crimes*, 13 CURRENT DIGEST OF THE SOVIET PRESS, No. 18, at 21 (1961).

²¹⁴A few Soviet jurists, however, characterize the educational use of legal institutions as "persuasion." Gutsenko, Dobrovalskaya & Raginsky, *supra* note 130, at 21, concerning the comrades' court system; Ilyichev, *supra* note 204, at 10. Tumanov, *supra* note 202, at 8, argued that the concept of the educational role of law applies only to criminal law. Letter from Harold J. Berman to David A. Funk, April 7, 1969.

Persuasion is sometimes contrasted with compulsion in the form of direct force applied by courts. Gorshenin, *Soviet Court Is Important Weapon For Strengthening Socialist Law*, 6 CURRENT DIGEST OF THE SOVIET PRESS, No. 45, at 12 (1954); Mironov, *supra* note 146, at 60; Romashkin, *Problems of the Development of the State and Law in the Draft Program of the C.P.S.U.*, 1 SOVIET LAW AND GOVERNMENT 3, 7 (1961). Nevertheless, the persuasion contemplated generally utilizes the propaganda methods of authoritarian education rather than open, interactive discussion. Zhogin, *Questions of Soviet Law: Abreast of the Times*, 16 CURRENT DIGEST OF THE SOVIET PRESS, No. 3, at 24, 25 (1964), asserted that "[t]he Marxist-Leninist science of law . . . must actively influence the consciousness of the working people and must propagandize and strengthen the democratic principles of life in Soviet society." *But see* Golunsky, *supra* note 190, at 22, that public discussion of draft laws not only "helps inculcate a socialist attitude toward the law," but also serves to achieve "a more complete and proper expression of the people's will in the laws."

if for no other reason.²¹⁵ Thus, legal institutions and procedures which exemplify the educational role of socialist law in practice tend to confirm the theoretical conflict between authoritarian education and the rule of law in this portion of Soviet jurisprudence.

IV. REMAKING THE REMAKERS AND THE RULE OF LAW

The relationship between an authoritarian role for socialist law and the rule of law finally demonstrates that the ultimate goal of Soviet jurisprudence is utopian.²¹⁶ Marxist-Soviet theory views man as a product of bourgeois society who must be remade before the state and law can wither away.²¹⁷ The Communist

²¹⁵See generally Berman & Spindler, *supra* note 201, at 902-05. Soviet jurists argue that comrades' courts not only educate the people to do without law but also herald the inception of the withering away of the state. In so far as comrades' courts embody spontaneous social pressure, it may be claimed that the educational process is not authoritarian and is, in fact, democratic. In practice, however, the Communist Party maintains sufficient controls to make this analysis unrealistic. Berman & Spindler, *supra* note 201, at 862, observed with respect to nominations of judges for comrades' courts, that "[i]n any event the Party would have ultimate control regardless of the nominating procedure established by statute" Also, "the procuracy, as general guardian of legality, has the power to protest decisions of Comrades' Courts, under the U.S.S.R. Statute on Procuracy Supervision," although ". . . as of 1963 it seems not to have exercised such power." *Id.* This seeming reluctance to intervene is probably explained by the relative triviality of the matters before the comrades' courts. *Id.* at 900. But cf. Maggs, *Commentary on Liberty, Law and the Social Order*, 58 NW. U.L. REV. 657, 662 (1963), on the Soviet claim of a considerable amount of government supervision in fact over the comrades' courts.

²¹⁶J. STONE, *supra* note 174, ch. 10, argued that it is utopian to expect power holders during the dictatorship of the proletariat to abdicate, so the timetable for the withering away of the state and law will always be extended into an indefinite future. R. SCHLESINGER, *supra*, note 2, at 261; Kelsen, *supra* note 31, at 84-85; Shaffer, *Communism and Fascism: Two Peas In a Pod?*, in *THE SOVIET SYSTEM IN THEORY AND PRACTICE* 28, 35 (H. Shaffer ed. 1965). J. HAZARD, *COMMUNISTS AND THEIR LAW* 198 (1969), described the goal of the withering away of the state as "[v]isionary." But see J. HAZARD, *THE SOVIET SYSTEM OF GOVERNMENT* 6 (4th rev. ed. 1968).

²¹⁷For Western comment on the general Marxist-Soviet doctrine of the withering away of the state and its implications, see, e.g., T. DENNO, *supra* note 100; S. STUMPF, *MORALITY AND THE LAW* 45-85 (1966); Berman, *The Challenge of Soviet Law*, 62 HARV. L. REV. 449 (1949); Berman, *supra* note 125, at 95-99 & 138-39; Campbell, *supra* note 4, at 56-66; Gsovski, *supra* note

Party, as the vanguard of the proletariat²¹⁸ and the architect of the new society, is to carry out the renovation program. The focus in Marxist-Soviet thought, however, is upon society in general, its present ills, how it can be remade, and the eventual idyllic future society. This cleverly leaves out of consideration the characteristics of the vanguard itself.²¹⁹ If man initially is the product of bourgeois society, the vanguard initially must be the product of that society too. Elite power-holders in bourgeois society are conspicuously reluctant to relinquish positions of power voluntarily. Yet this is just what must happen if the dictatorship of the proletariat is to give way to communism.²²⁰

The significant question is how the vanguard is to be changed during the dictatorship of the proletariat to prepare *it* for the withering away of the state. Here the relationship between using law in authoritarian education and the rule of law reveals a theoretical impediment to the withering away of the state and law. Using law in a process of authoritarian education tends to destroy the rule of law as a standard to which individuals may appeal to judge those in charge of legal processes. Moreover, elimination of rule of law standards removes the very mechanisms

2; Hazard, *The Withering Away of the State: The Function of Law*, SURVEY: A JOURNAL OF SOVIET AND EAST EUROPEAN STUDIES, No. 38, at 72-79 (1961); Kelsen, *supra* note 31, at 84-86; Kline, *supra* note 113, at 63-71.

²¹⁸J. STALIN, FOUNDATIONS OF LENINISM 109-11 (1939). CONSTITUTION (FUNDAMENTAL LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS art. 126, as amended by the first session of the Seventh Supreme Soviet of the U.S.S.R. (1967), calls the Communist Party of the Soviet Union "the vanguard of the working people in their struggle to build communist society and . . . the leading core of all organizations of the working people, both government and non-government."

²¹⁹The Party claims that "it always thinks in terms of the interests of all the people and approaches each specific question from this viewpoint." FUNDAMENTALS OF MARXISM-LENINISM, *supra* note 100, at 687. To the present author, familiar only with bourgeois Western society, this seems highly unlikely and, at the least, completely unsupported. A more sympathetic author with actual experience in a Communist system shows this Party self-assessment to be simply false. M. DJILAS, THE NEW CLASS 37-69 (1957).

²²⁰"[W]hen classes disappear and the dictatorship of the proletariat withers away, the Party will also wither away." J. STALIN, *supra* note 218, at 119.

necessary to *remake the remakers* of society.²²¹ The rule of law is both a necessary check on the power of Communist Party leaders and a necessary condition for their continuing responsiveness and reform.

Without the controls of the rule of law and the hope it offers of reforming the law-making vanguard, the program of Soviet jurisprudence becomes locked into its second phase—the dictatorship of the proletariat. In fact, current glimmers of hope for the Soviet Union lie in some resuscitation of the very rule of law ideals which were the victims of Stalinist authoritarianism.²²² Rule of law ideals, however, conflict with the Soviet program of authoritarian education. Carried to a logical conclusion, admission of rule of law doctrines into Soviet jurisprudence would destroy the authoritarian educational use of socialist law and prevent the authoritative remaking of man admitted to be necessary for communism. In either case, the withering of the state and law cannot be achieved, at least by the means Soviet jurists propose. Those initially attracted to the professed goals of Soviet jurisprudence should consider this difficulty before they embark on the Marxist road toward the withering away of the state and the classless society.

²²¹Cf. G. LICHTHEIM, *MARXISM* 371 (2d rev. ed. 1965) that “[i]t was the emancipation of the Bolshevik party—ultimately the Soviet dictatorship—from all forms of democratic control that made possible the identification of ‘planning’ with the untrammelled rule of a new privileged class.”

²²²As the paternalist writings of Soviet jurists cited *supra* tend to indicate, the proceduralist program referred to in notes 4 and 113 *supra* is not typical of Soviet legal thought.

**ALLIS-CHALMERS RECYCLED:
A CURRENT VIEW OF A UNION'S RIGHT
TO FINE EMPLOYEES FOR CROSSING A PICKET LINE**

EDWARD P. ARCHER*

The purpose of this Article is to review the law regarding union authority to discipline strikebreakers as it has developed on a case by case basis with a critical appraisal of the premises upon which the most significant decisions are based. Because of the recent Supreme Court decisions in *NLRB v. Granite State Joint Board, Textile Workers, Local 1029*,¹ *NLRB v. Boeing Co.*,² and *Booster Lodge 405, Machinists v. NLRB*,³ this seems an appropriate time to carefully view the result of this case-by-case development and to determine (1) if that result reasonably reflects what Congress might have intended when it passed the relevant portions of the National Labor Relations Act⁴ and (2) whether consideration should be given at this time to additional interpretation by Board regulations or legislation relating to this issue.

With regard to this issue, as with regard to many other critical issues under the Act, the statutory language is only peripheral and several seemingly pertinent provisions conflict with one another to result in a lack of conclusive direction from Congress.⁵ Four provisions in the Act seem most relevant. Sec-

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¹409 U.S. 213 (1972).

²412 U.S. 67 (1973).

³412 U.S. 84 (1973).

⁴29 U.S.C. § 158(b)(1)(A) (1970). [The National Labor Relations Act, as amended, is hereinafter referred to as NLRA.]

⁵With respect to critical issues regarding labor relations, Congress is deliberately vague in its statutory pronouncements since to be specific would result in no legislation achieving the necessary majority. See *National Woodworker Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967), and *Electrical Workers v. NLRB*, 366 U.S. 667 (1961), discussing the Supreme Court's view of the definiteness of congressional direction regarding secondary picketing and hot cargo agreements under sections 8(b)(4)(B) and 8(e) respectively. Pertaining to section 8(b)(1)(A), Professor Cox asserted shortly after the passage of the Taft-Hartley Act of 1947 that

tion 7 provides the basic protection to organizational activities by employees.⁶ Section 13 specifically protects the employees' right to strike except as that right is specifically restricted in the NLRA.⁷ Section 8(b)(1)(A), which is most pertinent to this issue, provides generally that it is an unfair labor practice for a union to restrain or coerce employees in the exercise of their section 7 rights, with the proviso that that language was not meant to impair a union's right to prescribe its rules regarding acquisition or retention of membership.⁸ Section 8(b)(2) coupled with section 8(a)(3) provides that a union cannot cause an employer either to discriminate against an employee or to encourage or discourage union membership unless the employee has failed to tender his dues or initiation fees required under a lawful security clause as a condition of membership.⁹ In addition,

[t]he scope and variety of the . . . problems suggest that [s]ection 8(b)(1) may plunge the [National Labor Relations] Board into a dismal swamp of uncertainty. . . . A long period of uncertainty and a heavy volume of litigation will be necessary before the questions of interpretation can be resolved.

Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 33 (1947).

6

Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . to engage in other concerted activities for the purpose of collective bargaining . . . and shall also have the right to refrain from any of all such activities

29 U.S.C. § 157 (1970).

7

Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications in that right.

Id. § 163.

⁸Section 8(b)(1)(A) provides that it shall be an unfair labor practice for a labor organization or its agents

to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein

Id. § 158(b)(1).

⁹Section 8(b)(2) provides that it shall be an unfair labor practice for a union or its agents

section 101(a)(5) of the Labor Management Relations Act provides procedural protection to employees in union disciplinary actions.¹⁰

The Supreme Court's first significant confrontation with the issue of the legality of union discipline of strikebreakers occurred in *NLRB v. Allis-Chalmers Manufacturing Co.*¹¹ That case was indecisively disposed of in a four-one-four opinion. From that indecisive vote and the similarly indecisive action of the Seventh Circuit¹² preceding the Supreme Court's decision, one cannot conclude that the legislative history clearly defines the intent of

to cause or attempt to cause an employer to discriminate . . . against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Id. § 158(b)(2).

Section 8(a)(3) provides that it shall be an unfair labor practice for an employer

by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment. . . .

Id. § 158(a)(3).

¹⁰The Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U.S.C. §§ 401-531 (1970), was designed to establish fair and democratic internal union procedures. In regard to union discipline that Act provides that

[a] member may not be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues . . . unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Id. § 411(a)(5).

¹¹388 U.S. 175 (1967).

¹²This case was first decided by a panel of the Seventh Circuit which upheld the Board decision. 149 N.L.R.B. 67 (1964). On rehearing that decision was reversed in a four-three opinion, *Allis-Chalmers Mfg. Co. v. NLRB*, 358 F.2d 656 (7th Cir. 1966), which was later reversed by the Supreme Court. 388 U.S. 175 (1967).

Congress and dictates a specific result. It is, however, possible to review the premises upon which the Court's conclusion was based and the subsequent development of the law relating to each of the Court's holdings. This will be the initial objective of this Article.

In *Allis-Chalmers* a union imposed fines of twenty to one hundred dollars upon members who crossed its picket line and went to work during an authorized strike in support of the union's contract demands. Two-thirds of the members had voted by secret ballot to strike. After the charged members were fined, the employer filed an unfair labor practice charge against the union and alleged a violation of section 8(b)(1)(A). The National Labor Relations Board sustained the Trial Examiner's dismissal on the ground that even if the union's disciplinary fines were "restraint or coercion" within the meaning of section 8(b)(1)(A), they were protected by the proviso that such prohibitions do not impair a union's right to prescribe "its own rules with respect to the acquisition or retention of membership"¹³ After the Seventh Circuit reversed the Board,¹⁴ the Supreme Court in turn reversed the Seventh Circuit and upheld the Board's decision.

The Court first stated that it was unrealistic to regard the words "restrain or coerce" of section 8(b)(1)(A) as precisely covering the union conduct in this particular case.¹⁵ Furthermore, the Court held that court enforcement of fines was no more coercive than court enforcement of other obligations of citizens.¹⁶ After discussion of the national labor policy regarding majority rule and a majority union's power to bargain away individual employee rights and the corresponding safeguard of a union's obligation to fairly represent all employees, the Court stated that "[i]ntegral to . . . federal labor policy has been the power in the chosen union to protect itself against erosion of its status . . . through reasonable discipline of members who violate rules and regulations governing membership."¹⁷ "That power," noted the

¹³149 N.L.R.B. at 69.

¹⁴*Allis-Chalmers Mfg. Co. v. NLRB*, 358 F.2d 656 (7th Cir. 1966).

¹⁵388 U.S. at 179.

¹⁶*Id.*

¹⁷*Id.* at 181.

Court, "is particularly vital when members engage in strikes."¹⁸ The Court reviewed the legislative history of the Taft-Hartley amendments which were passed in 1947 to limit the excessive power of unions over employees.¹⁹ From this review of both sections 8(b)(1)(A) and (8)(b)(2), the Court concluded that the language of section 8(b)(1)(A) proscribing action restraining or coercing employees was not applicable to court enforcement of fines under that set of circumstances. It supported this conclusion by pointing out that the contract theory of union membership was in existence at the time of the Taft-Hartley amendments and that Congress considered it an acceptable practice for a union to enforce a fine upon an employee member (including a strikebreaker) for violation of union rules by expulsion from the union.²⁰ From this the Court concluded that to hold that fines could be enforced by expulsion but not by court enforcement would "visit upon the member of a strong union a potentially more severe punishment than court enforcement of fines, while impairing the bargaining facility of the weak union by requiring it either to condone misconduct or deplete its ranks."²¹ The Court specifically noted that it was not considering the Board's conclusion that the union's action in this case fell within the protection of the proviso to section 8(b)(1)(A) but rather was basing its decision on the conclusion that the union's action did not even come within the purview of the statute since it did not "restrain or coerce" employees within the meaning of section 8(b)(1)(A).²² The Court specifically limited this decision to circumstances (1) involving reasonable fines,²³ (2) in which the collective bargaining contracts involved did not require full membership but only required that an employee become and remain a member to the extent of paying his monthly dues,²⁴ and (3) in which the employees involved were full members.²⁵

¹⁸*Id.*

¹⁹Pub. L. No. 80-101, 61 Stat. 136 (1947), *codified at* 29 U.S.C. §§ 141-201 (1970).

²⁰388 U.S. at 182, 192.

²¹*Id.* at 192.

²²*Id.* at 192 n.29.

²³*Id.* at 192-93.

²⁴*Id.* at 196-97.

²⁵*Id.*

Justice White, in his concurring opinion, adopted the Court's reasoning that since expulsion was permitted by Congress under the proviso, there was no reason to conclude that Congress under section 8(b)(1)(A) had outlawed the less severe penalty of fines enforceable in court action.²⁶ Writing for the four dissenting justices, Justice Black concluded that the proviso to section 8(b)(1)(A) could not be read to authorize the Court's holding.²⁷ Justice Black relied upon the literal meaning of "restrain or coerce" and charged the Court with relying not on legislative history, which he described as ambiguous, but rather on its policy judgment that unions, especially weak ones, need the power to impose fines in court.²⁸ Justice Black rejected the Court's contention that unions have a right to impose fines as a lesser penalty than expulsion and noted that, if union membership had little value and if the fines were great, court enforcement might be a more effective punishment than expulsion.²⁹ Justice Black also rejected the Court's conclusion that court enforcement was commonplace in 1947 and challenged the validity of the "contract theory" of enforcing union discipline.³⁰ He described the legislative history underlying sections 8(b)(1)(A) and 8(b)(2) as inconclusive and relied upon the plain meaning of the words "restrain or coerce."³¹ He then took issue with the Court's unwillingness to pass upon the question of whether a union could lawfully enforce a fine in a court action against a "member" whose membership consisted solely of paying financial obligations required under a union shop provision. Justice Black contended that employees would not be aware of this subtle distinction or, if aware, would be unwilling to cross the picket line and rely upon later litigation before the Board to protect them from the collection of fines.³²

²⁶*Id.* at 197-98.

²⁷*Id.* at 200.

²⁸*Id.* at 201.

²⁹*Id.* at 204.

³⁰*Id.* at 205, 207.

³¹*Id.* at 208.

³²*Id.* at 215-16.

I. EXPULSION: A MORE SIGNIFICANT SANCTION THAN A FINE?

Both the majority and minority opinions in *Allis-Chalmers* were based in part on the conclusion that expulsion is generally a more significant sanction than the imposition of a reasonable fine. While the dissent did not accept this as justifying the court enforcement of fines, the majority clearly did.³³ The basis of the majority opinion was that court-enforced reasonable fines for crossing picket lines do not "restrain or coerce" employees within the meaning of section 8(b)(1)(A). Neither opinion discussed at any length the impact of expulsion on an employee.

Sections 8(b)(2) and 8(a)(3) provide that a union may not cause an employer to discriminate against an employee who has been denied membership or whose membership has been terminated on some ground other than this failure to tender periodic dues and initiation fees. Assuming a union has expelled an employee for crossing its picket line during a lawful strike, one wonders what the employee has lost. Social pressure is no doubt exerted upon him. But this would result from his crossing the picket line in the first instance, and while his later expulsion may prolong that pressure indefinitely, the difference is still a matter of degree. An employee who has decided to cross the picket line must be well aware that he will be ostracized by the striking employees.

An expelled employee does lose his right to vote regarding later union decisions, including, for example, strike votes or contract ratification votes.³⁴ From its earliest decisions, however, the Board has held that expulsion from a union is prohibited if it affects an employee's employment rights.³⁵ In *Local 167, Progressive Mine Workers v. NLRB*,³⁶ the Seventh Circuit recently

³³See notes 21, 22 *supra*.

³⁴*NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

³⁵

Congressional recognition of a labor organization's right to make its own rules presumes, of course, its right to invoke them—except where implementing of such rules is expressly prohibited, as in the case of affecting an employee's employment rights.

Minneapolis Star Tribune Co., 109 N.L.R.B. 727, 728 (1954).

³⁶422 F.2d 538 (7th Cir.), *cert. denied*, 399 U.S. 905 (1970).

enforced a Board order that a union violated section 8(b)(1)(A) in expelling employees who were represented by a rival union when the expulsion made those employees ineligible to participate in the union's welfare plan. The employees had tendered the equivalent of the dues required for membership, but the union had rejected them.

However, in the past a distinction has been made between benefits granted by a union to its members and benefits negotiated by the union to benefit all the employees it represents. In *NLRB v. Local 286, UAW*,³⁷ the Seventh Circuit refused to enforce a Board order relating to a section 8(b)(1)(A) charge against the union for threatening to deprive employees of group hospitalization because they had refused to pay certain disciplinary assessments and fines which the union had imposed upon them. The court found no violation because under the facts of that case the court concluded that the insurance benefit was a derivative benefit arising from union membership and not a condition of employment.³⁸ The insurance in this instance was purchased by the union out of an increased amount in the dues deducted from the employees' checks for the union.³⁹ Still, when the benefit involved is a condition of employment, the Board would find a union in violation of section 8(b)(1)(A) should it threaten to withhold the condition of employment if union fines are not paid.⁴⁰

In discussing the effects of union expulsion, attention should be given to the Board's extraordinary holding in *United Mine Workers*.⁴¹ In this case, which did not involve union discipline, the General Counsel alleged that the Mine Workers' pension re-

³⁷222 F.2d 95 (7th Cir. 1955).

³⁸*Id.* at 98.

³⁹The differences between the Board and the court of appeals in this case related only to the fact finding issue as to whether the insurance was a condition of employment or a derivative benefit of union membership. *Local 286, UAW*, 110 N.L.R.B. 371 (1954).

⁴⁰*Teamsters Local 729*, 167 N.L.R.B. 147 (1967); *Clothing Workers Union*, 151 N.L.R.B. 584 (1965). See also General Counsel's Administrative Ruling No. SR-656 (1960), which makes this same distinction between benefits from union membership and conditions of employment. 46 L.R.R.M. 1387 (1960).

⁴¹202 N.L.R.B. No. 79, 82 L.R.R.M. 1609 (Mar. 26, 1973).

quirement that pensioners be members in good standing was in violation of section 8(b)(1)(A). The case was appealed to the Board after the Administrative Law Judge had granted the union's motion to dismiss the complaint in view of the Supreme Court's holding in *Pittsburgh Plate Glass Co. v. NLRB*⁴² that retired employees were not "employees" within the meaning of the NLRA. The General Counsel argued that this case was distinguishable from *Pittsburgh Plate Glass* because the good standing requirement would affect *active* employees since they would know that when they reached retirement age they could be eligible for pension benefits only if they had maintained their union membership. Rejecting this distinction, both the Board and the Administrative Law Judge noted that active employees were required to maintain membership under a valid union security clause and to be eligible for certain fund benefits and hence concluded that the impact on active miners was uncertain and speculative.⁴³

The ramifications of this case are frightening unless in the future the Board limits the holding to the facts of the case. The facts do not encompass the situation in which a union has expelled a member and thereby sought to prevent his collection of pension benefits at retirement age. The majority distinguished an earlier case⁴⁴ in which a union was held by the Board to have violated section 8(b)(2) by demanding the discharge of three employees and thus causing one of the employees to be denied hospital benefits. The distinction advanced by the Board that pensions were not involved but rather hospital benefits which have an *immediate* impact as opposed to an impact at retirement is questionable.⁴⁵

The Board in *United Mine Workers* specifically noted and relied upon the fact that no showing was made of the impact of

⁴²404 U.S. 157 (1971). Here the union sought to bargain regarding increased benefits for pensioners. The Court held that the employer was not required to bargain under section 8(a)(5) regarding such increased benefits because the retired employees were not "employees" within the meaning of the NLRA.

⁴³82 L.R.R.M. at 1611.

⁴⁴Local 140, *United Furniture Workers*, 109 N.L.R.B. 326 (1954).

⁴⁵82 L.R.R.M. at 1612 n.6.

lost pension rights on current employees.⁴⁶ It would seem that the impact is self-evident. A similar impact appeared self-evident to the Supreme Court in *NLRB v. Erie Resistor Corp.*⁴⁷ In *Erie Resistor*, the Court upheld the Board position that in extending superseniority to strikebreakers an employer could be found to have violated section 8(a)(3) regardless of motive because of the "inherently discriminating or destructive" nature of the conduct.⁴⁸ The Board had reasoned in *Erie Resistor* that the offer of superseniority to strikebreakers would affect all employees on a lasting basis after the strike was over.⁴⁹ It explained that at one stroke those who had spent long years earning seniority would have it removed and that this action would make future bargaining difficult.⁵⁰ One doubts that there was any specific evidence in the record to support the Board's reasoning, but then none was needed since the result to current employees was self-evident. The impact on current employees of the loss of their pension rights appears equally self-evident. The loss of pension rights appears to be even more destructive than the loss of effective seniority because at retirement, when the pension rights are lost, the employee can do nothing to establish comparable rights in other employment.

On the other hand, if the impact on current employees is not self-evident, which a majority of the Board held in this case, what type of evidence would be necessary to establish that impact? If a majority of the Board would only require testimony of several employees that they were currently concerned that unless they retain their membership in good standing they would lose their pensions, such testimony could readily be supplied. In any event, if this were a controlling consideration, it would seem that a remand to afford the General Counsel an opportunity to produce this evidence would have been essential since

⁴⁶*Id.* at 1611 n.5.

⁴⁷373 U.S. 221 (1963).

⁴⁸*Id.* at 228. A similar effect was recognized by the Supreme Court in *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954), in which the Court sustained the Board order that a union had violated sections 8(b)(1)(A) and 8(b)(2) by having the employer reduce the seniority status of an employee who was delinquent in paying his union dues.

⁴⁹373 U.S. at 230-31.

⁵⁰*Id.*

it was hardly clear prior to the Administrative Law Judge's decision that the Board would have required this.

There are additional problems with the Board's understanding of pension rights in *United Mine Workers*. Carried to its logical extreme, it appears the Board is allowing a union to withhold pension benefits regardless of whether they were earned as terms and conditions of employment or as mere incidents of union membership because those benefits are not enjoyed until after an employee loses his employee status.⁵¹ It is difficult to believe that the Board would hold that a union may cause an employer to cease payments into an employee's retirement program as a legitimate union disciplinary measure. This would violate section 8(a)(2) of the NLRA. But could a union prevail upon an employer or a pension trust not to pay out benefits to an employee after he has retired because he lost his good standing while he was an employee? Based upon the Board's reasoning in *United Mine Workers*, it is difficult to find that such employer conduct would constitute a section 8(a)(2) violation. However, to the employee there is no difference between the result in the first situation and that in the second. Moreover, if the union could in fact lawfully take the second action in directing the cutoff of benefits to the retired employee, could it not also legally advise the employee while he was yet working that it could take this action? Is this not comparable to an employer's telling employees during a union organization campaign that it has made the irrevocable decision to close the plant if the union wins the election? In dictum the Supreme Court in both *NLRB v. Darlington Manufacturing Co.*⁵² and *NLRB v. Gissel Packing Co.*⁵³ noted that such an employer's statement would not

⁵¹In that decision the Board made no issue of the distinction between conditions of employment and incidents of union membership.

⁵²380 U.S. 263 (1965).

Nothing we have said in this opinion would justify an employer interfering with employee organizational activities by threatening to close his plant, *as distinguished from announcing a decision to close already reached by the board of directors or other management authority empowered to make such a decision.*

Id. at 274 n.20 (emphasis added).

⁵³395 U.S. 575 (1969). Here the Court stated as regards an employer's right to communicate to his employee during an election campaign that

be in violation of the NLRA. Concededly, there are differences between these two situations. A union is not in a position to finally withhold pension payments to retired employees, whereas the board of directors is empowered to make the irrevocable decision to close down the plant. Nonetheless, one wonders how much comfort an employee could take in this fact if the union stated it would do all within its power to assure a cutoff in pension payments after his retirement. This is especially true if the past record of the union in accomplishing this result has been successful.⁵⁴

The Board's position that the employees in this case were required under a valid union security provision to be members in good standing is also unconvincing as a basis for rejecting the obvious conclusion that the current employees would fear loss of pension rights and be intimidated into keeping their union status. Although a union may legally enter into a union shop agreement, if there is no state limitation under section 14(b),⁵⁵ it could not under section 8(a) (3) and section 8(b) (2), at least until *United Mine Workers*, cause an employer to take any discriminatory action against an employee who had tendered the equivalent of dues

[h]e may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or *to convey a management decision already arrived at to close the plant in case of unionization.*

Id. at 618 (emphasis added).

⁵⁴In a slightly different context in *NLRB v. Servette Inc.*, 377 U.S. 46 (1964), the Supreme Court held that the threat to pamphlet a secondary employer was not a "threat" within the meaning of section 8(b) (4) because it was something the union had a right to do. If under the Board's decision a union would have a right to act to cut off pension payments to retired employees, would it be threatening and coercing employees within the meaning of section 8(b) (1) (A) to so advise those employees of its intended legal action?

⁵⁵

Nothing in this [Act] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

29 U.S.C. § 164(b) (1970).

and initiation fee. The valid union security agreement in this case could require no more, and yet the eligibility for pension benefits in this case was conditioned not on the tender of the equivalent of dues and initiation fee but rather on membership in good standing.

It would appear, then, that unless the Board distinguishes this holding from cases involving union expulsion for disciplinary reasons, unions could have an effective economic weapon by threatening to cut off employees' pensions after they retire if they cross the union picket line. This threat would obviously loom more ominous in some industries than in others since the union would have more potential control over payments in some industries than in others. At the risk of overgeneralization, it would seem that union potential for accomplishing this result would be greater with the stronger unions. A weak union would not likely be able to cause an employer against its will to take this kind of action. Accordingly, this would afford strong unions yet another powerful weapon against its most susceptible employees—those nearing retirement age—without affording much strength, if any, to weaker unions. In *Allis-Chalmers*, the Supreme Court found and relied heavily upon a congressional intent in section 8(b)(1)(A) to provide a national policy that would have exactly the opposite result, namely, to provide strength to weaker unions rather than to stronger unions.⁵⁶

In view of these alarming and undesirable results, it seems likely that the Board will not apply the *United Mine Workers* decision expansively to employees who lose their membership in good standing as a result of union disciplinary action. Hopefully, should the Board apply *United Mine Workers* to disciplinary action, the courts would not tolerate it and would not enforce Board decisions based upon this reasoning. The Board has consistently held that a union cannot affect an employee's terms and conditions of employment by expelling employees.⁵⁷ This trend should not be reversed because of the limited holding of the Supreme Court in *Pittsburgh Plate Glass* that retired employees are not "employees" within the meaning of the NLRA.⁵⁸

⁵⁶388 U.S. at 184.

⁵⁷See note 40 *supra*.

⁵⁸See note 42 *supra*.

Regardless of the effects of expulsion on union members, expulsion can have negative effects for the union. Under section 9 a union must fairly represent all employees in the unit it is authorized to represent and a union's breach of that obligation can be remedied either by action in the state or federal court⁵⁹ or by charges filed with the Board.⁶⁰ In fact, in view of the necessity of showing some illegitimate motive behind a union's failure to fairly represent a particular employee, an expelled employee would probably be better able to obtain relief through these channels than an employee whom the union did not discipline. Accordingly, it seems clear that the law provides substantial remedial channels for relief to an expelled employee should the union attempt to mistreat him by failing to represent him properly either through the grievance procedure or in negotiations.

In addition, the Board has held in *Local 4186, United Steelworkers*⁶¹ that even under a lawful union shop security clause a union cannot insist upon payment of dues from an employee whom it has expelled. In *Steelworkers*, the Board upheld the Trial Examiner's finding that the union violated section 8(b) (1)(A) by threatening to request an expelled employee's discharge unless he paid his membership dues while simultaneously continuing disciplinary sanctions imposed as a result of his having filed a decertification petition.⁶² In this case the union ini-

⁵⁹*Vaca v. Sipes*, 386 U.S. 171 (1967).

⁶⁰*Hughes Tool Co.*, 147 N.L.R.B. 1573 (1964); *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

⁶¹181 N.L.R.B. 992 (1970).

⁶²

Whenever a petition shall have been filed . . . by an employee . . . alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative . . . or (ii) *assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section* . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. . . .

29 U.S.C. § 159(c) (1970) (emphasis added).

tially expelled the employee. Then, in subsequent proceedings, it modified its sanction to a suspension of his rights to attend union meetings for a period of more than a year and an indefinite suspension of his right to hold union office. The Board had held in earlier decisions that a union could lawfully suspend⁶³ or expel⁶⁴ employees who filed decertification petitions to provide for its own self-preservation. Nonetheless, the Board in this case held that there was no justification, either in the proviso of 8(b)(1)(A) or in consideration of a labor union's need for self-preservation, for the union to both limit the employee's membership rights and, at the same time, threaten to enforce the security clause if he did not continue to pay his dues.⁶⁵ It is apparent from these cases that the Board has held that a union cannot enforce an employee's obligation under a lawful security clause to pay his dues by demanding discipline or discharge of the employee by the employer if the employee has not been afforded full membership rights of a member in good standing. This position of requiring full membership rights before permitting the union to require the payment of any dues appears somewhat harsh in view of the prior holding that an employee who chooses not to become a member under an agency shop arrangement can be denied certain of the rights of membership but can nonethe-

⁶³United Steelworkers, Local 4028, 154 N.L.R.B. 692 (1965), *enforced*, 373 F.2d 443 (9th Cir. 1967), *cert. denied*, 392 U.S. 904 (1968).

⁶⁴Tawas Tube Prods., Inc., 151 N.L.R.B. 46 (1965).

⁶⁵See also Printing Pressmen, Local 3, 188 N.L.R.B. 420 (1971), in which the Board adopted pro forma the Trial Examiner's finding that the union had violated section 8(b)(1)(A) by threatening to cause an employer to discharge an employee and section 8(b)(2) by its later action of requesting the employer to discharge the employee because of the employee's failure to pay the equivalent of his dues. The Trial Examiner had found the union was not entitled to the dues because it had not offered to restore the employee to membership in good standing. The union had not excepted to those findings of the Trial Examiner. This case related to union fines imposed for alleged failure to perform required picketing duty and back dues for the period of suspension which the union required the employee to pay before it would remove him from a status of "coventry" in which union employees were directed not to speak to him. The Trial Examiner concluded that when and if the union unconditionally restored the employee to good standing membership, including release from "coventry," the employee would be required to tender dues to it, but not before.

less be compelled to pay the full dues and initiation fee.⁶⁶ An employee who is subjected to lawful union discipline which results in his being denied some of those rights apparently stands in better stead in being able to refuse payment of dues required under the contract than an employee who has chosen to reject the union.

In addition to the above, under the recent decisions in *NLRB v. Granite State Joint Board, Textile Workers, Local 1029*⁶⁷ and *Booster Lodge 405, Machinists v. NLRB*,⁶⁸ the Supreme Court has upheld the position that an employee cannot be subjected to union fines once he has resigned his union membership. The reasoning of these cases would appear to be equally applicable to employees who have been expelled by the union. In *Scofield v. NLRB*,⁶⁹ relied upon by the majority in *Granite State*, the Supreme Court held that section 8(b)(1) permits a union to enforce adopted rules pertaining to union interest "against union members *who are free to leave the union and escape the rule.*"⁷⁰ In *Scofield*, the Court held that the union's action in (1) fining employees who currently accepted payment for working in excess of the union's production ceiling in violation of the union's work rules and (2) enforcing those fines against full members in court actions was not in violation of section 8(b)(1)(A). Accordingly, if a union expels a member, it not only loses continued monetary support from that former member, but it also loses its disciplinary authority over him.

In summary, when an employee is expelled from a union, the union can exert social pressure on the employee, exclude the employee from participation in any of the union decision making processes, and deny financial benefits which are direct incidents

⁶⁶See *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), in which the Supreme Court did not object to the union practice that nonmembers in an agency shop would be required to pay full dues but nonetheless would be excluded from participation in the internal affairs of the union such as attending union meetings or voting upon ratification of contracts. It goes without saying that they could not hold positions as officers in the union.

⁶⁷409 U.S. 213 (1972).

⁶⁸412 U.S. 84 (1973).

⁶⁹394 U.S. 423 (1969).

⁷⁰*Id.* at 430 (emphasis added).

of union membership. It cannot, with the possible serious exception of pension benefits, discussed at length above, deprive the employee of any benefits which are conditions of employment. It must continue to represent the employee fairly, to bargain for his benefit, and to process grievances on his behalf. Moreover, for periods when the employee is not afforded the full membership rights of a member in good standing, it cannot require that he pay his dues to the union; and, if the member is expelled, the union has lost its disciplinary power to fine him.

Based upon this analysis one can better appraise the Supreme Court's view in *Allis-Chalmers* that expulsion, at least when strong unions are involved, is a more severe penalty than a court-enforced fine. Perhaps this has validity if social pressure is the significant means for enforcing the union's will upon the recalcitrant employee. However, though perhaps to a lesser degree, social pressure could well be relied upon as a means to enforce a union's will upon an employee in any situation in which the employee was not expelled but fined or even in which no formal disciplinary action was taken by the union. In regard to the right to participate in the union's internal affairs, employees who would be most interested in being active in internal union affairs would generally be the ones least likely to cross the picket line. With respect to the usual majority of employees who are inactive, the removal of this right might be viewed as of no consequence. The loss of incidents of membership such as union-sponsored welfare programs and insurance programs will obviously vary depending on the extent that the particular union provides these benefits and their specific value to the employee in question. The potential right of a union to act to remove retired employees from pension programs, if it were ultimately found lawful, would be particularly damaging, as noted above, when the union had sufficient strength to accomplish that result. After expulsion, the union's obligation to fairly represent the employee would remain unimpaired and the union would lose the possibility of requiring the employee to pay his dues. In regard to this latter point, only unions which have lawful union security provisions could require such payments. It is likely, except in the possible situation of collusion with the employer, that unions which have obtained such union security clauses would be relatively stronger than those unions which have not been able to obtain such a contract provision. To the extent that this generalization is valid, this lessened ability to collect dues would have greater impact on stronger unions than it would on weaker unions. In

Allis-Chalmers, the Supreme Court concluded that expulsion would be a more severe remedy if a strong union were involved rather than a weak one since a weak union would be more inclined to condone the misconduct lest it deplete its ranks.⁷¹ However this conclusion should be somewhat tempered by the realization that the strong union, at least with respect to collecting dues, would be more adversely affected by expelling employees than a weaker union since a weak union without a security agreement would not be in a position to collect dues from a recalcitrant employee anyway, whereas a strong union with the security agreement could at least have counted on receiving the dues. Finally, a union's loss of power to discipline expelled employees could undermine the power and authority of the union to adequately represent its people.

II. FINES: RESTRAINT OR COERCION OF EMPLOYEES?

The second point of *Allis-Chalmers* that deserves further comment is the Court's conclusion that fines do not "restrain or coerce" employees within the meaning of section 8(b)(1)(A). This conclusion was based at least in part on the Court's assumption that expulsion was a more severe punishment than a fine. Since that time the validity of this assumption has been substantially reduced by subsequent opinions of the Supreme Court.⁷² In *Allis-Chalmers*, the Board concluded that fines for crossing picket lines were in fact "restraint or coercion" within the meaning of section 8(b)(1)(A) but that they were permissible under the proviso which permits unions to prescribe their own rules with respect to acquisition or retention of membership.⁷³ Consistent with its view of "restraint or coercion," the Board had earlier held in *Local 138, Operating Engineers*⁷⁴ that a union could not impose fines on mem-

⁷¹388 U.S. at 192.

⁷²See text accompanying notes 84, 85, 86 *infra*.

⁷³Local 248, UAW, 149 N.L.R.B. 67 (1964), *enforcement denied sub nom. Allis-Chalmers Mfg. Co. v. NLRB*, 358 F.2d 656 (7th Cir. 1966), *rev'd*, 388 U.S. 175 (1967).

⁷⁴148 N.L.R.B. 679 (1964).

There can be no doubt that a fine is by nature coercive, and that the imposition of a fine by a labor organization upon a member who files charges with the Board does restrain and coerce that member in the exercise of his right to file charges. The union's conduct is

bers for failing to exhaust union remedies before filing an unfair labor practice charge with the Board. Shortly thereafter, the Board further held in *Marine & Shipbuilding Workers*⁷⁵ that a union was in violation of section 8(b)(1)(A) in expelling a member for failing to exhaust union remedies before filing an unfair labor practice charge. This decision was upheld by the Supreme Court in *NLRB v. Marine & Shipbuilding Workers*,⁷⁶ its first union fine case subsequent to the *Allis-Chalmers* decision. In this case, although not directly discussing the question of whether expulsion was "restraint or coercion," the Court limited itself to the question of whether the section 8(b)(1)(A) proviso protected the union action.

In another closely related area of law, the Board has held that though expulsion constituted coercion within the meaning of section 8(b)(1)(A), a union is protected by the proviso in expelling a member who has filed a decertification petition against the union.⁷⁷ The Board distinguished this situation from that in *Local 138, Operating Engineers*,⁷⁸ by pointing out that when a member filed a decertification petition the member attacked the very existence of the union and could, if permitted to retain his membership status, be privy to the union's strategy and tactics while attempting to destroy the union's representative capacity.⁷⁹ In cases after the Supreme Court's *Allis-Chalmers* decision, the Board held that, while a union for its own self-preservation may expel an employee for filing a decertification petition, it could not fine the employee for that action.⁸⁰

no less coercive where the filing of the charge is alleged to be in conflict with an internal union rule or policy and the fine is imposed allegedly to enforce that internal policy.

Id. at 682.

⁷⁵159 N.L.R.B. 1065 (1966), *enforcement denied*, 379 F.2d 702 (1967), *rev'd*, 391 U.S. 418 (1968).

⁷⁶391 U.S. 418 (1968).

⁷⁷*Tawas Tube Prods., Inc.*, 151 N.L.R.B. 46 (1965). See also *Price v. NLRB*, 373 F.2d 443 (9th Cir. 1967), in which the court of appeals upheld the Board's position that a union could lawfully suspend an employee who had filed a decertification petition against it.

⁷⁸148 N.L.R.B. 679 (1964).

⁷⁹151 N.L.R.B. at 48.

⁸⁰*Molders, Local 125*, 178 N.L.R.B. 208 (1969), *enforced*, 442 F.2d 92 (7th Cir. 1971).

It is apparent from these cases that even after *Allis-Chalmers* the Board still thought that fines were coercive within the meaning of section 8(b)(1)(A) but were protected under some circumstances by the proviso to that section. In addition, the Supreme Court has itself backed away from its *Allis-Chalmers* conclusion that fines are not coercive. In a subsequent opinion, *Scofield v. NLRB*,⁸¹ the court did not discuss whether court-enforced fines were coercive under section 8(b)(1)(A). Rather the Court held that the union fine imposed upon members for breaching the internal union rule regarding production ceilings was lawful, not because the fine was not coercive, but because it involved enforcement of a properly adopted union rule which the Court found reflected a legitimate union interest, impaired no federal labor policy, and was enforceable only against union members who were free to leave the union and escape the rule.⁸² This reasoning closely paralleled the reasoning of the Board in its original *Allis-Chalmers* decision which was based upon the scope of the proviso of section 8(b)(1)(A).⁸³ Similarly, in *NLRB v. Granite State Joint Board, Textile Workers, Local 1029*,⁸⁴ the Supreme Court recently held that a union could not fine employees after they had resigned from the union. Here again no attention was paid to the position taken by the Court in *Allis-Chalmers* that fines were not coercive within the meaning of section 8(b)(1)(A). This is par-

⁸¹394 U.S. 423 (1969).

⁸²*Id.* at 436.

⁸³

Respondents have properly maintained the distinction between the treatment of the individual as a member of the union and treatment of him as an employee. They have imposed the fine only on their own members. It is not alleged that the Respondents ever attempted to affect the jobs or working conditions of any of the fined individuals. *Nor is it alleged that the rule prohibiting members from crossing a picket line during a strike is not the legitimate concern of a union or properly the subject matter of internal discipline.* It may be said then that the Respondents were engaged in enforcing their own rules with respect to the acquisition or retention of membership. Since, *under the proviso*, section 8(b)(1)(A) does not impair the right of a labor organization to do this, it follows that the Respondents did not violate that section.

Local 248, UAW, 149 N.L.R.B. 67, 69 (1964), *enforcement denied sub nom. Allis-Chalmers Mfg. Co. v. NLRB*, 358 F.2d 656 (7th Cir. 1966), *rev'd*, 388 U.S. 175 (1967) (emphasis added).

⁸⁴409 U.S. 213 (1972).

ticularly noteworthy because in *Allis-Chalmers* the Court had been acting in apparent reliance upon the contract theory of union membership. Under the pure version of that theory a union would be unable to collect fines from employees for incidents which occurred after they were members of the union because at that time there would be no consent to the union constitution and bylaws—the “contract” which the court enforces under such a theory. Accordingly, a fine could not be lawfully collected from a resigned member except perhaps, as discussed above, under a threat of losing pension benefits after retirement. The other forms of union pressure, such as incidents and rights of union membership, would already have been voluntarily waived by the employee by his resignation from the union. Social pressure upon the resigning member obviously would not be more effective solely because he had chosen to leave the union rather than suffer expulsion from the union. Finally, in *NLRB v. Boeing Co.*,⁸⁵ the Supreme Court’s most recent case on this matter, the Court expressly admitted that although “all fines are coercive to a greater or lesser degree,”⁸⁶ it had based its earlier opinions on the conclusion that section 8(b)(1)(A) was “not intended . . . to apply to the imposition by the union of fines not affecting the employer-employee relationship and not otherwise prohibited by the Act.”⁸⁷

In summary, both the Board and the Supreme Court have withdrawn from the initial reasoning in *Allis-Chalmers* that fines are not “coercive.” While in *Boeing* the Court adhered to its position that it was still not relying on the section 8(b)(1)(A) proviso as the basis for its conclusion that the union’s action in imposing fines did not violate section 8(b)(1)(A), the Court clearly recognized fines to be coercive and relied on the same factors the Board had used in its earlier opinions in which it protected union fines under the proviso.

III. LIMITATIONS ON THE APPLICATION OF ALLIS-CHALMERS

A. *Voluntary Membership as a Requirement*

The majority of the Court in *Allis-Chalmers* specifically noted that under the contract involved in that case employees had a

⁸⁵412 U.S. 67 (1973).

⁸⁶*Id.* at 73.

⁸⁷*Id.*

choice of becoming full members or only becoming financial members by paying the equivalent of dues and initiation fees.⁸⁸ The Court rejected the point made in the en banc opinion of the Seventh Circuit that full membership was not the result of individual voluntary choice but of the insertion of the security provision in the contract under which a substantial minority of the employees may have been forced into membership.⁸⁹ The Court specifically found, based in part upon the lack of any evidence to the contrary, that the employees who had been fined in that case were all "full members."⁹⁰

The question exists whether this option of an agency shop arrangement is necessary in order for the court to uphold the validity of a union fine against a member for crossing a lawful picket line. If it is, a union is disadvantaged, under this portion of the law, by a union shop provision which under its terms requires not just the payment of dues and initiation fees but also the actual act of becoming a member of the union. It would seem overly technical to make this distinction, especially in view of the fact that under sections 8(b)(2) and 8(a)(3) a union cannot cause an employer to take any discriminatory action against an employee even if he is not a full member of the union unless he fails to tender the equivalent of dues and initiation fee. The only possible exception to this general statement is pension payments for retired employees, discussed above; but this potential means of coercion would be equally available against full members or financial members. Accordingly, unless a full membership requirement in a union shop agreement could be specifically enforced under section 301 of the Labor Management Relations Act,⁹¹ the union shop provision under this Act is not significantly different in legal effect from an agency shop provision. Under both, a union can only effectively enforce through employer pressure an employee's financial obligation.

The extent that an average employee is aware of this limited union enforcement power is questionable. More likely than not

⁸⁸388 U.S. at 196.

⁸⁹*Id.* at 196 n.11.

⁹⁰*Id.* at 196.

⁹¹29 U.S.C. § 185 (1970).

he will believe that the contract language which requires full membership can readily be enforced to its full extent. This argument resembles that provided by the Seventh Circuit opinion which was later rejected by the Supreme Court. In that opinion, the court of appeals relied upon this same likelihood of employee ignorance and concluded that, even when the contract provided employees a choice, full membership was not the result of individual choice but of the union security language in the contract.⁹² In answer to the Seventh Circuit's reasoning, the Supreme Court in *Allis-Chalmers* stated, in language which may be dispositive of this question, that "the relevant inquiry . . . is not what motivated a member's full membership, but whether the Taft-Hartley amendments prohibited disciplinary measures against a full member who crossed the picket line."⁹³ This language could be construed to apply to union shop provisions which require full membership as well as to agency shop provisions which afford an employee a choice.⁹⁴

In view of the lack of legal difference between the agency and union shops, no distinction regarding union disciplinary power should be made based on the two forms of union security. It appears unfair that a union which has negotiated the strongest form of lawful union security clause should, due to legally useless distinction, find itself with less authority to control its members than a union which has negotiated the lesser form of union security. This author has found no cases in which the Board or the courts have discussed the possible difference in union rights under union shop or agency shop provisions. All of the Supreme Court cases relating to union fines involved contracts under which employees

⁹²NLRB v. *Allis-Chalmers Mfg. Co.*, 358 F.2d 656, 660 (7th Cir. 1966), *rev'd*, 388 U.S. 175 (1967).

⁹³388 U.S. at 196.

⁹⁴In *Booster Lodge 405*, the parties had a maintenance of membership clause which required new employees, as a condition of employment, to become members of the union unless they notified both the union and the company within forty days of accepting employment that they did not wish to join. Members were also required to maintain their membership during the life of the contract. 412 U.S. at 85 n.1. In that case, there was discussion of this issue, but the strike which gave rise to the litigation occurred after one contract had expired and was aimed at achieving a new contract. Consequently, no contract with this provision was effective at that time.

were required by the union security provision to be no more than paying members.⁹⁵

B. Fines Imposed Only On Members

In *Allis-Chalmers* and *Scofield*, the Supreme Court specifically noted, in upholding the union's fines, that the fines were imposed only on union members.⁹⁶ The recent decisions of *NLRB v. Granite State Joint Board, Textile Workers, Local 1029*⁹⁷ and *Booster Lodge 405, Machinists v. NLRB*⁹⁸ followed this earlier language of the Court. In *Granite State*, the Court held that a union's power over an employee ends when he lawfully resigns from the union.⁹⁹ In that case, when the collective bargaining agreement expired, the union membership, including the employees who were subsequently fined, voted to strike. Furthermore, while participating in a meeting held shortly after the strike, at least some of those employees did not oppose a union resolution that any member aiding or abetting the employer during the strike would be subject to a two thousand dollar fine.¹⁰⁰

⁹⁵*NLRB v. Granite State Joint Bd., Textile Workers, Local 1029*, 409 U.S. 213 (1972); *Scofield v. NLRB*, 394 U.S. 423 (1969); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

⁹⁶388 U.S. at 196; 394 U.S. at 430.

⁹⁷409 U.S. 213 (1972).

⁹⁸412 U.S. 84 (1973).

⁹⁹

Where a member lawfully resigns from a union and thereafter engages in conduct which the union proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. That is to say, when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street.

409 U.S. at 213.

¹⁰⁰Before the First Circuit, the Board conceded in oral argument that all of the employees who ultimately resigned and were subjected to union fines for crossing the picket line had voted to strike. Furthermore, the only direct evidence on the record before the court of appeals regarding the participation of the fined employees in the two thousand dollar fine vote was that of the second employee to resign who testified that he was present when the fine vote was taken and did not oppose it. *NLRB v. Granite State Joint Bd., Textile Workers, Local 1029*, 446 F.2d 369, 370 n.2 (1st Cir. 1971), *aff'd*, 409 U.S. 213 (1972).

The court of appeals had accepted the union's argument that the strike vote bound the employees to support this particular strike until its conclusion.¹⁰¹ The union cited the Supreme Court's language in *Allis-Chalmers* to the effect that the power to impose fines is "particularly vital when the members engage in strikes"¹⁰² and that "the power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent."¹⁰³ The court of appeals concluded that participation in the strike vote and fine vote meetings constituted a waiver by the employees of their rights under section 7 to refrain from participation in that particular strike.

The Supreme Court, on the other hand, said it would give little weight to the fact that the resigning employees had participated in the vote to strike.¹⁰⁴ It noted that the first two members to resign did so from one to two months after the strike had begun and that the others did so from seven to twelve months after the strike had begun.¹⁰⁵ The Court also noted that the duration of the strike may have increased the specter of hardship to the striker's family and specifically concluded that it was not deciding to what extent the contractual relationship between the union and the member could curtail the freedom to resign.¹⁰⁶ The Court stated that when members are not restrained from resigning "the vitality of section 7 requires that the member be free to refrain in November from the actions he endorsed in May"¹⁰⁷

In *Booster Lodge 405*, the union had fined employees for crossing the picket line and returning to work. The union attempted to distinguish this set of facts from those in *Granite State* by arguing that even though the union's constitution did not expressly restrict the right to resign during a strike, it did impose on members an obligation to refrain from strikebreaking.¹⁰⁸ The union

¹⁰¹*Id.* at 372-73.

¹⁰²*Id.* at 373.

¹⁰³*Id.*

¹⁰⁴409 U.S. at 217.

¹⁰⁵*Id.*

¹⁰⁶*Id.*

¹⁰⁷*Id.* at 217-18.

¹⁰⁸412 U.S. at 88-89.

asserted that that provision had been consistently interpreted in the past as binding a member, notwithstanding his resignation, to abstain from strikebreaking for the duration of a strike.¹⁰⁹ The Court rejected this argument by noting that nothing in the record indicated that union members were informed beforehand that the no-strikebreaking provision was interpreted to impose such an obligation on a resignee. It further stated that the union's position could be sustained only by first finding "that the Union constitution by implication extended its sanctions to nonmembers, and that such sanctions were consistent with the [National Labor Relations] Act."¹¹⁰ The Court refused to find an implied postresignation commitment and so never reached the second question of whether such a commitment would be consistent with the NLRA. Justice Blackmun in his concurring opinion noted that unlike *Granite State*, none of the employees in *Booster Lodge 405* who resigned had been given notice of the strikebreaking penalty either before the strike vote or before their participation in the strike.¹¹¹

The Court, in *Granite State* and *Booster Lodge 405*, appeared to ignore its earlier language in *Allis-Chalmers* regarding the essential nature of a union's right to fine or expel strikebreakers. At first glance, it now appears that an employee, before he transgresses a union rule, need only resign from the union to avoid the union's disciplinary processes. However, a close reading of the Court's decisions reveals that those decisions have not dealt with the problem of limiting a union's power to curtail a member from resigning. Until the Board or the courts say otherwise, such union power may be substantial.

Absent any limitation in either the collective bargaining agreement or the union constitution and bylaws, the Court in *Granite State* appeared to have left open the possibility that a strike vote supported by the membership could under some circumstances preclude employees from resigning their membership immediately after the start of the strike to avoid union fines for crossing the picket line. The Court merely stated that in the absence of a restraint on resignation, section 7 requires that a member "be free to refrain in November from the actions he endorsed in May

¹⁰⁹*Id.* at 89.

¹¹⁰*Id.*

¹¹¹*Id.* at 91.

...¹¹² This language cannot be literally applied because the Court stated this after particularly noting that the first binding resignation took place one or two months after the strike began. This is especially true in view of the Court's further comment that the likely duration of the strike may increase the specter of hardship to an employee's family.¹¹³

If either the courts or the Board were to rely on this distinction in a future case, problems would present themselves. First, how long must an employee wait after the strike vote and the inception of the strike to be free to resign his union membership and be free of union discipline in crossing the picket line? Secondly, would this time period vary depending upon the individual circumstances of the employee and his family? No doubt some employees could hold out more successfully than others in any given strike. Thirdly, would the details of the strike vote be controlling? In *Granite State*, all the employees voted for the strike at the outset. But would it make any difference if the employees who later crossed the picket line voted against the strike in either a close or lopsided strike vote? Would this individual rejection of the strike insulate those employees against union discipline or would they be bound by the majority? If individual action is controlling and the union relies on a secret ballot, how reliable would the employee's later testimony be regarding his vote once he became aware that if he testified that he had voted for the strike, the union discipline would be upheld? This also raises the problem of overseeing the validity of the voting process. The Board has of necessity set up an elaborate procedure for assuring the validity of elections to determine the representative status of a union. To what extent would the court have to require a simulation of this procedure? If the ballot were not secret, could the vote be binding on the employees or would the specter of group pressure, not to mention the possibility of coercive action, invalidate this process as representative of the individual choice?¹¹⁴

¹¹²409 U.S. at 217-18.

¹¹³*Id.* at 217.

¹¹⁴In the analogous circumstances of an employer poll to determine union majority status, the Board has accepted the District of Columbia Circuit's position, taken in *Operating Eng'rs, Local 49 v. NLRB*, 353 F.2d 852 (D.C. Cir. 1965), that for the poll to be valid, in addition to other safeguards, the poll must be conducted by secret ballot. *Struksnes Constr. Co.*, 165 N.L.R.B. 1062 (1967).

Absent any limitation in either the collective bargaining agreement or the union constitution, the Court in both *Granite State* and *Booster Lodge 405* specifically left open the possibility that a union practice in limiting acceptable times for resignation could impose a binding limitation on the right of employees to resign. The Court specifically noted that its decisions were limited to circumstances in which there were no restraints on the resignation of members.¹¹⁵ In *Granite State*, the Court mentioned with approval that the court of appeals had dismissed the union's argument that it had a practice of accepting resignations only during an annual ten-day escape period because there was no evidence that the employees knew of this practice.¹¹⁶ In *Booster Lodge 405*, the Court specifically noted that there had been nothing in the record to indicate that the members were informed of an interpretation of a provision in the union constitution imposing an obligation on a resignee.¹¹⁷

Assuming no limitation in either the constitution or bylaws but assuming the parties have included a union shop agreement in their contract, would this contractual agreement bind the employees to retain their membership for the period of the contract? In *Granite State*, the parties did not have a union shop agreement.¹¹⁸ In *Booster Lodge 405*, the parties had a maintenance of membership provision in their contract but the strike occurred between contracts.¹¹⁹ When the strike occurs to further the union's bargaining position for a new contract, after the expiration of the old, as in *Booster Lodge 405*, it would appear that the union security agreement would expire along with the former contract and could be of no effect.¹²⁰ In contract negotiations, however, a union security clause could be a factor if the parties agreed to continue

¹¹⁵409 U.S. at 217; 412 U.S. at 88.

¹¹⁶409 U.S. at 217 n.5.

¹¹⁷412 U.S. at 89.

¹¹⁸409 U.S. at 219 n.3.

¹¹⁹412 U.S. at 88 n.8.

¹²⁰The proviso language to section 8(a)(3) which permits such union security agreements requires that there be an agreement between the employer and a labor organization to support this exception to the section 8(a)(3) prohibition of discriminatory conduct designed to encourage union membership.

operating under the former contract for a limited period during the contract negotiations.

Although the parties might have an applicable lawful union shop agreement, this apparently could not be construed as a contract requirement binding on the employees to be full members of the union. In *Allis-Chalmers*, the Court in some of its language appeared to consider the fact that employees had the equivalent of an agency shop opportunity to choose not to be full members as supporting its conclusion that the court-enforced fines in that case were not coercive within the meaning of section 8(b)(1)(A).¹²¹ It would seem inconsistent with the Court's reasoning in that case to conclude that the addition of compulsory full membership in the union rather than just financial membership would now become a critical element depriving employees of their section 7 right to effectively resign from the union to avoid its disciplinary action. Such a conclusion would also appear to conflict with the accepted proposition that under sections 8(b)(2) and 8(a)(3) a union shop affects employment rights only to the extent of requiring an employee to pay his financial obligations to the union. A union cannot seek discriminatory employer action against an employee for failing to become a full member so long as he has in fact tendered the equivalent of his dues and initiation fee.¹²² If this is the only obligation which Congress intended that the union could enforce against the employee, it would seem unreasonable that the union could now use this contract to compel an employee to remain susceptible to union disciplinary fines.

The most likely means for the union to compel continued membership would be through its constitution and bylaws. One can anticipate that all unions which utilize disciplinary fines will amend their constitutions and bylaws to provide specific limitations on members' rights to resign.¹²³ The problem remains whether or not the courts will uphold such constitutional restrictions. If indeed they uphold all such restrictions, they will render *Granite State* and *Booster Lodge 405* ineffective. Yet under the pure contract theory of fine enforcement it would appear that to the

¹²¹388 U.S. at 196.

¹²²29 U.S.C. §§ 158(a)(3), (b)(2) (1970).

¹²³In *Booster Lodge 405*, the Court noted that at the 1972 international union convention the union did make its interpretation of the strikebreaking proscription explicit. 412 U.S. at 89 n.9.

extent such limitations do not invade or frustrate an overriding labor or public policy, such fines ought to be enforceable. Such an interpretation, however, would ignore the language in *Scofield v. NLRB*¹²⁴ that restricts the enforcement of such fines to those union members who are free to leave the union and escape the rule.¹²⁵ To permit a union to amend its constitution and thereby limit the circumstances under which a member may resign and avoid union disciplinary action seems inconsistent with the Court's conclusion in *Granite State* that the members cannot provide by vote that employees who resign and cross the picket line will be subject to fines.

Another possible result of *Granite State* should be mentioned. *Local 4186, United Steelworkers*¹²⁶ made it clear that if a union expels a member under a union shop agreement, it can no longer require payment of dues from that expelled member until he is reinstated to full membership. It would seem likely that if an employee resigned from the union, the union would be able to continue requiring the payment of dues under such a union security agreement. If this were not so, all requirements of a union shop could be completely avoided by an employee's resignation from the union.

Suppose that during a long strike by a union whose prior contract included a union or an agency shop agreement, when the employer's offer included no proposal to change that provision, a large percentage of the employees resign the union to return to work. The union would likely lose the strike and capitulate to the employer. If the employer were then to change its last offer to remove the union or agency shop clause, it might be held to have breached its obligation to bargain in good faith under section 8(a) (5).¹²⁷ Yet if the employer signs the contract with the union shop

¹²⁴394 U.S. 423 (1969).

¹²⁵*Id.* at 430.

¹²⁶181 N.L.R.B. 992 (1970).

¹²⁷While it may be a difficult question as to whether an employer would be in breach of its obligation to bargain in good faith in withdrawing a portion of its offer to the union after the union lost the strike, even if this conduct constituted an unfair labor practice, the Board remedy would be totally ineffective because it clearly could not order the employer to include this prior clause in the contract in view of the NLRA's limitation that the "obligation [to bargain in good faith] does not compel either party to agree

clause in it, the employees would be required to financially support the union for the duration of the contract. Moreover, under the Board's contract bar rules, they would be unable to raise the question of the majority status of the union for the remainder of the term of the contract.¹²⁸

C. Reasonableness of Fines

The above commentary relates entirely to "reasonable fines." The Court in *Allis-Chalmers* specifically limited its decision to circumstances in which a "reasonable" fine was involved.¹²⁹ After *Allis-Chalmers* the Board initially took the position in *Machinists, Lodge 504*¹³⁰ that Congress did not intend to have the Board regulate the size of the fines and establish standards with respect to their reasonableness. In so concluding, the Board relied at least in part on the apparently now avoided position of the Supreme Court in *Allis-Chalmers* that court-enforced fines were not coercive under section 8(b) (1) (A). The Board also took note of the fact that the Supreme Court in its opinion had observed that state courts, in reviewing the imposition of union discipline, find ways to prevent discipline which involves a severe hardship.¹³¹

The Board has adhered to its contention that it has no authority to review the reasonableness of the size of the fine the union

to a proposal or require the making of a concession." 29 U.S.C. § 158(d) (1970). See *Porter Co. v. NLRB*, 397 U.S. 99 (1970).

¹²⁸In the interest of promoting stability in labor relations, the Board has adopted certain rules which prevent one from questioning the representation status of an incumbent union. A current collective bargaining agreement will bar an election among employees unless a rival petition is filed within the thirty day "open" period defined as not more than ninety days before nor within sixty days of the termination date of the contract. *Leonard Wholesale Meats, Inc.*, 136 N.L.R.B. 1000, 1001 (1962).

¹²⁹

There may be concern that court enforcement may permit the collection of unreasonably large fines. However, even were there evidence that Congress shared this concern, this would not justify reading the Act also to bar court enforcement of reasonable fines.

388 U.S. at 192-93.

¹³⁰185 N.L.R.B. 365 (1970).

¹³¹388 U.S. at 193 n.32.

imposes under section 8(b)(1)(A).¹³² However, under slightly different circumstances in which the union struck an employer having as a small part of its business a military division fulfilling government contracts, and at the government's urging, the union agreed to have employees at that installation work during the strike, the Board found the union to have violated section 8(b)(1)(A) when it required each employee to sign a document promising to pay the union one-third of his gross daily wages for the duration of the strike as a condition for receiving a union pass to work.¹³³ The union required this document of members and nonmembers alike and enforced the signing of the agreement by threats of "big boys on the picket line." In finding the violation, the Board noted that the contribution was sought from both members and nonmembers alike and provisions for enforcement were by both threats and actual attempts to prevent employees from working.¹³⁴

While this decision, based on its unique set of facts, was enforced by the Sixth Circuit,¹³⁵ the Board's more general position that it has no authority under the Act to review the reasonableness of union fines had not been well accepted until, as subsequent discussion will show, the Supreme Court's opinion in *NLRB v. Boeing Co.*¹³⁶ The District of Columbia Circuit in *Booster Lodge 405, Machinists v. NLRB*¹³⁷ refused to accept the Board's conclusion that it had no authority to review the reasonableness of union fines. The court of appeals construed *Allis-Chalmers* to be applicable only to reasonable fines and cited the language in *Scofield* in which the Supreme Court referred to enforcement of a proper union rule "by reasonable fines."¹³⁸ Moreover, just prior to the Supreme

¹³²Printing Pressmen, Local 7, 192 N.L.R.B. 914 (1971); Printing Pressmen, Local 60, 190 N.L.R.B. 268 (1971); Communications Workers, Local 6135, 188 N.L.R.B. 971 (1971); Christian Labor Ass'n, 187 N.L.R.B. 762 (1971).

¹³³National Cash Register Co., 190 N.L.R.B. 581 (1971), *modified*, 466 F.2d 945 (6th Cir. 1972).

¹³⁴*Id.* at 584.

¹³⁵National Cash Register Co. v. NLRB, 466 F.2d 945 (6th Cir. 1972).

¹³⁶412 U.S. 67 (1973).

¹³⁷459 F.2d 1143, 1155-59 (D.C. Cir. 1972), *aff'd on other grounds*, 412 U.S. 84 (1973).

¹³⁸*Id.* at 1156.

Court's granting certiorari in *Booster Lodge 405*, the Ninth Circuit adopted the District of Columbia Circuit's position that reasonableness of fines is a factor which the Board has authority to consider in determining if a union has violated section 8(b)(1)(A) in imposing a fine on its members for crossing its picket line.¹³⁹ Despite the earlier language in *Allis-Chalmers* and *Scofield*, in *Boeing* the Supreme Court reversed the District of Columbia Circuit and upheld the Board's position that it had no jurisdiction to review the reasonableness of a union fine.¹⁴⁰

Exhaustive review of the merits of the Supreme Court's decision in *Boeing* is beyond the scope of this Article. However, one wonders what national labor policy justifies the Board's decision in *Printing Pressmen, Local 190*¹⁴¹ permitting a union to fine an employee two thousand dollars for crossing its picket line to work during a one-day union strike. In its prior language in *Scofield*, the Court had held that fines could lawfully be enforced only if they reflected a legitimate union interest and only if they impaired no policy Congress had embedded in the labor laws.¹⁴² This author sees no legitimate union interest in enforcing an unreasonable fine nor any reason that congressional policy should permit the enforcement of such a fine.

Even if state courts could provide relief in not enforcing such an unreasonable fine, this relief would no doubt vary from state to state and would result in nonuniform standards of "reasonableness" for fines. Moreover, as noted by Justices Douglas and Blackmun in their dissenting opinion in *Boeing*, employees would be required to hire counsel to resist the union's court collection in order to be free from union collection of unreasonable fines.¹⁴³ The Board process with free counsel would make it easier for individuals to resist such collections.¹⁴⁴

¹³⁹*Morton Salt Co. v. NLRB*, 472 F.2d 416 (9th Cir. 1972).

¹⁴⁰412 U.S. at 78 (1973).

¹⁴¹192 N.L.R.B. 914 (1971).

¹⁴²394 U.S. at 436.

¹⁴³412 U.S. at 81-82.

¹⁴⁴Professor Summers is the leading commentator on the question of state court enforcement of union fines. In *Booster Lodge 405*, he was cited approvingly by the District of Columbia Circuit, 459 F.2d at 1152 n.14. In his most recent writing on the subject, Professor Summers stated that "[t]he

The current state of the law under the Supreme Court rulings would not seem satisfactory from the union vantage point either. In regions of the country in which unions have successfully organized the employees, unions might well have difficulty in collecting any significant fines in state court actions.¹⁴⁵ Also, the Court minimized the Board's expertise¹⁴⁶ in this area by suggesting that state courts are often able to draw upon their experience in areas other than labor law, in particular, their expertise in misdemeanor cases.¹⁴⁷ This would seem to suggest that only minimal fines, as would ordinarily be imposed in a misdemeanor action, would fall within the Supreme Court's view of "reasonable" fines as enforced by the state courts. Such fines would not serve the purpose of deterring employees from crossing a picket line to earn their full incomes during a union strike.

This shortcoming in the current status of the law would not be overcome by a reversal of the Supreme Court's opinion in *Boeing*. Such a reversal would create a further question of the impact of federal preemption on state court enforcement of union fines. But such a question need not present any severe problem. In *Street, Electric Railway & Motor Coach Employees v. Lockridge*,¹⁴⁸ a bare majority of the Supreme Court adhered to the

danger that the legal rights of a disciplined member will go by default because of the cost of assisting them in court is obvious" Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175, 220 (1960).

¹⁴⁵The state cases cited by the Supreme Court in *Boeing* all came from industrial states such as California, Pennsylvania, New Jersey, Maryland, and Wisconsin where unionism is well established and accepted. 412 U.S. at 76-77 n.12.

¹⁴⁶Reflecting at the outset of his dissenting opinion in *Boeing*, Chief Justice Burger commented that

[i]t is odd, to say the least, to find a union urging on us severe limitation on NLRB authority, and telling us that state courts are the proper forum to resolve questions regarding the reasonableness of fines imposed on workers for violation of union rules. For years, there has been unrelenting union opposition to state court "intervention" into industrial disputes and union activities.

Id. at 78.

¹⁴⁷*Id.* at 77.

¹⁴⁸403 U.S. 274 (1971).

Court's prior decision under *San Diego Building Trades v. Garmon*¹⁴⁹ in which the Court held that, as a general rule, so long as the action involved is arguably protected under section 7 or prohibited under section 8 of the NLRA, state courts are preempted from acting. If the Board had jurisdiction to pass on the reasonableness of union fines, fines which were arguably unreasonable could not be enforced by the state courts since they would arguably be unfair labor practices prohibited under section 8(b)(1)(A). This would have the desirable result of enforcing some uniformity throughout the states with respect to the standards for reasonableness of union fines. On the other hand, this preemption should not unduly interfere with union rights to collect reasonable fines since, if the fines were reasonable, the Board should so conclude and dismiss the complaint under section 8(b)(1)(A). Such a dismissal could not reasonably be construed as an indication that the union activity in fining employees is protected activity since that would also preempt state courts from enforcing lawful disciplinary action which has been within the traditional jurisdiction of the state courts. Rather it would appear to be activity which is neither protected nor unprotected and which should be subject to state court enforcement under *Garmon*.¹⁵⁰

However, even if the doctrine of preemption were applied as noted, there would yet exist no federal law to compel the enforcement of reasonable union fines either by the Board or by state or federal courts. Under no theory would it constitute an unfair labor practice for an employee to refuse to pay a reasonable fine and so the Board could not compel payment. No theory has yet been devised under which federal courts would have jurisdiction to enforce such fines. State court enforcement would continue to suffer from the limitation noted above in regions in which unions

¹⁴⁹359 U.S. 236 (1959).

¹⁵⁰Admittedly the *Garmon* rule is currently subject to reconsideration by the Supreme Court in view of the Court's closely split decision in *Lockridge*. But the alternative proposed by the majority of the dissenting Justices in *Lockridge* of shifting to an actually protected or actually prohibited test, 403 U.S. at 325-26, while capable of causing substantial difficulties regarding other questions of preemption beyond the scope of this article, would not detrimentally affect the results of the preemption doctrine as applied to this issue.

have not been successful in organizing. This difficulty would appear to require additional legislation to resolve.

The related question of what should constitute a reasonable fine is also beyond the scope of this paper. As the District of Columbia Circuit noted, the Board would have to fashion guidelines to resolve this question on a case by case basis, as it was required to do by the Supreme Court in *NLRB v. Radio & Television Broadcast Engineers, Local 1212*¹⁵¹ regarding its resolution of section 10(k) jurisdictional disputes between rival unions.¹⁵²

D. Complexity of the Law

One of the difficulties cited by the minority of the Supreme Court in *Allis-Chalmers* was the difficulty that a union member would have in discovering his legal rights under section 8(b)(1)(A).¹⁵³ This is a particularly troublesome problem throughout all of labor law since the area has evolved into such complexity that even trained labor specialists have difficulty in remaining familiar with all the ramifications of the application of the law to today's labor relations problems. However, this problem is most acute with respect to areas of the law which relate specifically to the rights of an individual union member or employee nonmember relative to both his union and his employer. The likelihood of having ready access to the services of a well-trained labor specialist or of at least being aware of the location of the nearest Board regional office for consultation is much greater for both the union and the employer than it is for the employee. This is particularly distressing when one realizes that the NLRA was designed predominantly for the purpose of protecting individual employees in their employment relationships.

An employee, confronted with the simple question of whether he should honor his union's plea not to cross a picket line or his employer's urging to cross the line and perform his work, is held accountable for knowing a vast number of legal ramifications arising under several shades of factual differences. The employee's risk in acting incorrectly on this decision is great. If he incorrectly chooses to cross the picket line, the union could lawfully

¹⁵¹364 U.S. 573 (1961).

¹⁵²29 U.S.C. § 160(k) (1970).

¹⁵³388 U.S. at 203.

discipline him for breach of its instruction not to cross the line and such discipline could involve a fine of any magnitude. That fine could be enforced at least by expulsion from the union, if not by the state court. Such expulsion might jeopardize his pension rights in light of *United Mine Workers* and would no doubt destroy any rights he might have had as incidents of union membership. Moreover, the union could exclude him from internal union affairs in the future including participation in union decisions regarding strike votes and contract ratification votes. If, on the other hand, he chooses to honor his union directive and not cross the picket line, he is subject under varying circumstances to being discharged for having participated in an unprotected activity¹⁵⁴ or being permanently replaced as an economic striker¹⁵⁵ with only the right to be placed upon a preferential hiring list for jobs which may open up in the future.¹⁵⁶

Often the employee is unable to determine for himself to which of these employer actions he may be subjecting himself. For example, the kind of strike is a factor. The Board has held that a union violates section 8(b)(1)(A) by fining employees for refusing to join a strike which is in breach of its no strike clause with the employer.¹⁵⁷ The Board held that the public policy in favor of enforcement of collective bargaining contracts outweighs the union's right to discipline members for violating its rules. This raises all the complications of interpreting the meaning of the no strike clause in the contract. It requires that the employee assume this responsibility on his own behalf and that he be correct in his conclusion or be subject to the consequences. If the union strike is in breach of the no strike clause, the employee in honoring the strike would be participating in an unprotected activity and would be subject to employer discipline.¹⁵⁸ Subtleties often make such a decision difficult. In *Rocket Freight Lines Co. v. NLRB*,¹⁵⁹

¹⁵⁴*Kaynard v. Transport Workers Union*, 306 F. Supp. 344 (E.D.N.Y. 1969).

¹⁵⁵*NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

¹⁵⁶*Laidlaw Corp.*, 171 N.L.R.B. 175 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

¹⁵⁷*Glaziers Local 1162*, 177 N.L.R.B. 393 (1969).

¹⁵⁸*NLRB v. Rockway News Supply Co.*, 345 U.S. 71 (1953).

¹⁵⁹427 F.2d 202 (10th Cir.), *cert. denied*, 400 U.S. 942 (1970).

the union's conduct in fining members for crossing its picket line after the local union had approved its contract with the employer was found by both the Board and the court of appeals not to have been in violation of section 8(b)(1)(A) because the international union had rejected the contract and the Board and the court found that the parties understood the contract was to be conditioned upon the international's approval.

Interpretation of the meaning and application of the no strike clause or other related contract terms is difficult. In one case, the Board held that union fines designed to enforce observance of a sister union's picket line were in violation of section 8(b)(1)(A) because the contract explicitly prohibited any strike at the employer's premises and such fines were aimed at achieving a breach of that prohibition.¹⁶⁰ In subsequent cases, the Board refused to infer a no strike provision in a contract which did not expressly include such a provision.¹⁶¹ In another case, the contract specifically provided that the no strike clause would not be violated by individual union members' refusing to report to work because of a picket line of another union which had a bargaining agreement with the employer. In that case the Board held that the union did not violate its contract with the employer by imposing fines on members who crossed the picket line of another union which represented another unit of employees of the employer.¹⁶² The difficulty in foreseeing the ultimate legality or illegality of the action to fine employees is illustrated by this latter case. The contract only protected employees who refused to cross the picket line of "another union which has a collective bargaining agreement with the employer."¹⁶³ The picket line involved was that of a union representing another unit of the employer's employees but the contract had expired between that union and the employer and the union was striking to obtain a new contract. Technically, that union did not have a collective bargaining agreement with the employer at that time. Nonetheless, the Board seemed to ignore this literal language of the contract. Perhaps the Board should

¹⁶⁰Local 12419, United Mine Workers, 176 N.L.R.B. 628 (1969).

¹⁶¹Communications Workers, Local 9511, 188 N.L.R.B. 433 (1971); American Newspaper Guild, 186 N.L.R.B. 877 (1970).

¹⁶²Machinists Lodge 284, 190 N.L.R.B. 208 (1971), *modified*, 472 F.2d 416 (9th Cir. 1972).

¹⁶³*Id.* at 210.

have deferred this question of contract interpretation to an arbitrator,¹⁶⁴ but instead it chose to summarily conclude that this contract language was applicable and prevented the union's fines from violating section 8(b) (1) (A).

It is inconceivable that an employee even with the contract in hand, in this case, could have comfortably predicted the outcome of the Board proceeding and could have known how the law would determine the validity of a union fine against him for crossing the picket line. Individual employees can not be expected to understand and apply this law to their peculiar circumstances with any substantial likelihood of understanding their rights and responsibilities and the risks they will incur resulting from their choice of action. While it may be impossible to assure that everyone will be able to make knowledgeable choices of action, the law as it presently exists relating to section 8(b) (1) (A) falls far short in this regard.

IV. CONCLUSION

Each of these cases, *Allis-Chalmers*, *Scofield*, *Granite State*, *Boeing*, and *Booster Lodge 405*, as well as the Board's rulings in related cases, such as *United Mine Workers*, appear to be rationally decided opinions, when viewed individually. As stated, at the outset, these issues are not issues which are clearly resolved by the legislative history of the Act, and reasonable judges at all levels and Board members can and have differed on their outcome.

These cases collectively have fashioned the following law relating to the rights of unions to discipline employees for crossing its picket line. First, under *Allis-Chalmers* and *Granite State*, a union can fine its members who cross its picket line, but if the members lawfully resign from the union before crossing the picket line, the union cannot fine them. Under *Boeing*, it makes no difference under the NLRA whether or not those fines are reasonable in amount. Any fine is lawful if it is against union members for strikebreaking. This obviously creates an incentive for union members to leave the union during the height of battle,

¹⁶⁴In *Collyer Insulated Wire Co.*, 192 N.L.R.B. 1053 (1971), the Board took the position that under some circumstances it would defer questions of contract interpretation which underlie a charge of an unfair labor practice to an arbitrator.

an action which could substantially undermine the union's strike effort. Moreover, it would create an unworkable labor relations system for the employer for years to come. Its impact is similar to that in *Erie Resistor*.¹⁶⁵ In that case, the Supreme Court found that an employer could not offer superseniority to strikebreakers. The Court relied at least in part on the Board's contention that such superseniority, unlike hiring strike replacements, would divide the employees into two camps and detrimentally affect labor relations for years to come. Yet it is safe to assume that the employees who resigned the union to cross the picket line would remain, long after the strike, in a separate camp from the striking union employees so that labor relations would be detrimentally affected for years to come.

While under *Boeing* a union can impose any size fine without regard to its reasonableness, free from any jurisdiction of the Board, there are disadvantages for the union to do so. As noted above, state courts continue to be the source for enforcement of fines and, in those areas of the country in which unions might need such disciplinary power the most, the state courts would appear to be the least likely to enforce a significant fine.¹⁶⁶ Even where state courts will enforce reasonable fines, this fact alone makes excellent campaign material for employers in opposing union organizational campaigns. This intangible campaign weapon may outweigh the disciplinary benefits unions might attain by using fines, or at least unreasonable fines.

The law does not necessarily work to the complete benefit of the employers either, because once the employee has resigned from the union, the union's ability to discipline him disappears. If employees should choose a wildcat strike, it would appear, in light of *Granite State*, that if they resigned their union membership before they acted, the union would be helpless in its efforts to call the employees back. Indeed, the union's only remaining right would be to collect their dues under its union or agency shop arrangement.

When the union is threatened with employees resigning and removing themselves from its disciplinary power, it could perhaps, under the current state of the law, take effective action against those employees who viewed retirement rights as par-

¹⁶⁵NLRB v. *Erie Resistor Corp.*, 373 U.S. 221 (1963).

¹⁶⁶See note 145 *supra* & accompanying text.

ticularly valuable, by threatening to jeopardize their retirement benefits after they retire. Though this is the logical outgrowth of *United Mine Workers*, the Board or the courts would probably not permit that case to be so applied. Consequently, this right, as it should be, would likely be unavailable for disciplinary purposes. Lawful conduct to prevent mass resignations would then be nonexistent.

Together with these cases, one should consider *Teamsters Local 901*,¹⁶⁷ in which the Board held that it would not reverse its long standing rule that a union, which uses force or violence in violation of section 8(b)(1)(A) to prevent an employee from working, would not be liable under the NLRA to compensate for the pay the employee lost at work as a result of the illegal union action. With this Board holding, the use of force or violence might look appealing. The union could not be held, by the Board at least, responsible for damages resulting from that violence. Most employees would not be likely to hire their own counsel to pursue such relief in state courts, especially if they have been significantly intimidated.

This brief conclusion is admittedly an oversimplification of the law. The law has become so complex in its development, as reflected in the overall body of this Article, that a laborer would have absolutely no hope of being able to understand it and, most importantly, of being able to apply it to his circumstances and then to understand his rights and responsibilities under it.

In summary, an interpretation of section 8(b)(1)(A) has evolved which provides an incentive to employees to leave the union to further their own interests and which provides as well an incentive to a union to take unreasonable action against employees nearing pension age or illegal action utilizing force and violence against all employees. While each case viewed individually could be said to reflect a reasonable judgment as to congressional intent under section 8(b)(1)(A), the cases viewed collectively create a labor relations law relating to strike conduct which clearly could not have been within the view of Congress when section 8(b)(1)(A) was enacted.

However, the law is not entirely settled at this time because under *Granite State* and *Booster Lodge 405*, the Supreme Court

¹⁶⁷202 N.L.R.B. No. 43 (Mar. 20, 1973).

has left unanswered the prospect of a union's limiting the right of employees to resign in its constitution and bylaws or otherwise. This problem should be resolved only after a careful investigation of the necessity of union fines to maintain solidarity during strikes. This necessity has not yet been documented either affirmatively or negatively. On very slim evidence the Court concluded in *Allis-Chalmers* that the right to fine strikebreakers was essential to the right to strike. With no more evidence the Court ignored its own conclusion to this effect in the more recent *Granite State* and *Booster Lodge 405* cases. This information should be considered in light of section 13 of the NLRA in which Congress clearly indicated that it intended to protect the right to strike except to the extent that it was specifically restricted in the Act.¹⁶⁸

In the absence of any definitive legislative history, it is essential to determine the validity of the Supreme Court's conclusion in *Allis-Chalmers* that the right to fine strikebreakers is essential to the right to strike. If this is a valid conclusion nothing in the legislative history would indicate that Congress intended by section 8(b)(1)(A) to restrict a union's disciplinary power in such a way as to destroy the section 13 right to strike. On the other hand, if this is not a valid conclusion, a fine would be "coercive" as currently recognized by the Board¹⁶⁹ and the Supreme Court,¹⁷⁰ and limitations consistent with preserving the right to strike were probably intended by Congress to be imposed upon unions in their use of such disciplinary actions.

In view of the fact that the Board and the courts are currently confronted with the problem of determining the circumstances, if any, under which a union can lawfully restrict its members from resigning, the Board should utilize its long neglected rule-making powers to conduct a substantial legislative investigation to determine the necessity of union disciplinary authority to the right to strike. The Board should also reconsider the entire area of law which has evolved under section 8(b)(1)(A) in order to develop, to the extent that it still has freedom to do so under the legislative history and the Supreme Court

¹⁶⁸29 U.S.C. § 163 (1970).

¹⁶⁹See notes 73, 74 *supra* & accompanying text.

¹⁷⁰See text accompanying notes 84, 85, 86 *supra*.

rulings, rules relating to this area of the law which, when viewed as an entirety, would conform to existing practicalities and also which could be understood and relied upon by the working man who, in the last analysis, warrants the protection of the NLRA.

NOTE

FLOOD IN THE LAND OF ANTITRUST: ANOTHER LOOK AT PROFESSIONAL ATHLETICS, THE ANTITRUST LAWS AND THE LABOR LAW EXEMPTION

In "a century and a quarter since the New York Nine defeated the Knickerbockers 23 to 1 on Hoboken's Elysian Fields June 19, 1846 with Alexander Jay Cartwright as the instigator and the umpire,"¹ Americans have seen professional baseball rise from its meager beginnings in 1871 with the formation of the National Association of Professional Baseball Players to a multimillion dollar business² today. While baseball is still known for its power hitters, double plays, and diamond heroes, as well as the electronic invasion of lighted scoreboards and television, not to mention the advertising receipts, it has become equally well known for the irony of not actually being a business and thus qualifying as a select member of those granted exemption from the antitrust laws. Certainly, the case which today has provided the greatest single focus on this issue is *Flood v. Kuhn*,³ which reiterated the decisions of *Federal Baseball Club v. National League of Professional Baseball Clubs*⁴ and *Toolson v. New York Yankees, Inc.*,⁵ and held that neither baseball nor the reserve system, whereby players are permanently tied to ball clubs, is subject to the antitrust laws: a specious conclusion since all other professional sports are not exempt and baseball is an aberration. Nonetheless, any change would be, according to Mr. Justice Blackmun, a matter "for congressional, and not judicial, action."⁶ In reaching its decision, the Court found it unnecessary "to consider the respondents' additional

¹*Flood v. Kuhn*, 407 U.S. 258, 260-61 (1972).

²U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1972, at 753 (93d ed. 1972).

³407 U.S. 258 (1972).

⁴259 U.S. 200 (1922).

⁵346 U.S. 356 (1953).

⁶407 U.S. at 285.

argument that the reserve system is a mandatory subject of collective bargaining and that federal labor policy therefore exempts the reserve system from the operation of the federal antitrust laws.” Both the antitrust issue and the possible labor law exemption have arisen again in one of America’s youngest and fastest growing sports, professional hockey. But before dealing with this issue, it may be helpful to review some of its background.

I. DISSATISFACTION IN PROFESSIONAL SPORTS

A. *Contract Disputes and Curt Flood*

Baseball has, with the *Flood* case, perhaps provided the most famous contractual dispute of professional athletes⁸ and some of

⁷*Id.*

⁸The sports pages over the last decade have been marked by the considerable attention given to the contractual problems of professional athletes, most notably in the ranks of professional basketball, in which the basketball gypsy, Rick Barry, now back in the fold of the Golden State Warriors, has been journeying about between the National Basketball Association (NBA) and its new rival, the American Basketball Association (ABA), each time in search of “greener pastures.” Spencer Haywood, the basketball boy wonder of the 1968 Olympics, formerly of the Denver Rockets of the American Basketball Association, following the pattern of Barry and the advice of promoter Al Ross, negotiated a more satisfactory contract with the Seattle Supersonics of the NBA; and while Haywood was moving from the ABA to the NBA, Billy Cunningham, with the help of the courts, responded to the interleague warfare and financial bidding by traveling from the Philadelphia 76’ers of the NBA to the Carolina Cougars of the ABA, where he now performs. See *Washington Capitols Basketball Club, Inc. v. Barry*, 304 F. Supp. 1193 (N.D. Cal.), *aff’d*, 419 F.2d 472 (9th Cir. 1969); *Lemat Corp. v. Barry*, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (1969); R. BARRY WITH B. LIBBY, *CONFESSIONS OF A BASKETBALL GYPSY: THE RICK BARRY STORY* (1972). See also *Haywood v. National Basketball Ass’n*, 401 U.S. 1204 (1971); *Munchale Corp. v. Cunningham*, 457 F.2d 721 (4th Cir. 1972); S. HAYWOOD WITH B. LIBBY, *STAND UP FOR SOMETHING: THE SPENCER HAYWOOD STORY* (1972).

Football also has experienced the interleague wars of lucrative financial offers and contract jumping, but contract breaking in professional football has become a thing of the past with the congressional approval of the merger of the two football leagues. With the merger came the appearance of lower contract offers and the disappearance of antitrust litigation by the American Football League (AFL) against the National Football League (NFL) from whom the AFL was seeking to wrest some control of the football labor market. See *Houston Oilers, Inc. v. Neely*, 361 F.2d 36 (10th Cir.), *cert. denied*, 385 U.S. 840 (1966).

the most important litigation in the area of professional athletics and the antitrust laws. In October of 1969, Flood was traded from the St. Louis Cardinals to the Philadelphia Phillies. Flood complained and asked the Commissioner of Baseball to be made a free agent to bargain for himself. That request was refused. Flood then filed an antitrust suit against the Commissioner, the presidents of the two leagues, and the twenty-four major league teams. Flood's position was supported by the Major League Baseball Players Association, the players' collective bargaining representative. Flood specifically challenged the "reserve system", whereby a player is required to play for the team holding his contract or, unless released by that team or assigned to another team, not to play baseball in the United States.⁹ The contracting club also has

⁹Rule 3 of the Major League Rules provides in part:

(a) **UNIFORM CONTRACT.** To preserve morale and to produce the similarity of conditions necessary to keen competition, the contracts between all clubs and their players in the Major League shall be in a single form which shall be prescribed by the Major League Executive Council No club shall make a contract different from the uniform contract or a contract containing a non-reserve clause, and no club shall make a contract containing a non-reserve clause except permission be first secured from the Commissioner.

. . .

(g) **TAMPERING.** To preserve discipline and competition, and to prevent the enticement of players, coaches, managers and umpires, there shall be no negotiations or dealings respecting employment, either present or prospective, between any player, coach or manager and any club other than the club with which he is under contract or acceptance of terms, or by which he is reserved, or which has the player on its Negotiation List, or between any umpire and any league other than the league with which he is under contract . . . unless the club or league with which he is connected shall have, in writing, expressly authorized such negotiations or dealings prior to their commencement.

Rule 9 of the Major League Rules provides in part:

(a) **NOTICE.** A club may assign to another club an existing contract with a player. The player, upon receipt of written notice of such assignment, is by his contract bound to serve the assignee.

. . .

the unilateral right to renew the contract, subject to a certain minimum salary. Flood contended that this clause violated the

After the date of such assignment all rights and obligations of the assignor clubs thereunder shall become the rights and obligations of the assignee club.

The Uniform Player's Contract provides in part:

4. (a) . . . The Player agrees that, in addition to other remedies, the Club shall be entitled to injunctive and other equitable relief to prevent a breach of this contract by the Player, including, among others, the right to enjoin the Player from playing baseball for any other person or organization during the term of this contract.

5. (a) The Player agrees that, while under contract, and prior to expiration of the Club's right to renew this contract, he will not play baseball otherwise than for the Club, except that the Player may participate in post season games under the conditions prescribed in the Major League Rules

6. (a) The Player agrees that this contract may be assigned by the Club (and reassigned by any assignee Club) to any other Club in accordance with the Major League Rules and the Professional Baseball Rules.

. . .

10. (a) On or before December 20 (or if a Sunday, then the next preceding business day) in the year next following the last playing season covered by this contract, the Club may tender to the Player a contract for the term of that year by mailing the same to the Player at his last address following his signature hereto, or if none be given, then at his last address of record with the Club. If prior to March 1 next succeeding said December 20, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player at said address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the Club shall fix in said notice; provided, however, that said amount, if fixed by a Major League Club, shall be an amount payable at a rate not less than 80% of the rate stipulated for the preceding year. . . .

(b) The Club's right to renew this contract, as provided in subparagraph (a) of this paragraph 10, and the promise of the Player not to play otherwise than with the Club have been taken into consideration in determining the amount payable under paragraph 2 hereof.

Sherman Antitrust Act¹⁰ because it restrained his freedom to sell his services to whomever he so desired.¹¹

The district court found against Flood on the merits of all his causes of action.¹² The appellate court affirmed.¹³ The United States Supreme Court,¹⁴ in a five to three decision, applied *stare decisis* and followed the previous holding¹⁵ that baseball was in-

¹⁰15 U.S.C. §§ 1, 2 (1970). Section 1 of the Sherman Act provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal

Section 2 of the Act provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with the foreign nations, shall be deemed guilty of a misdemeanor

Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970) provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . .

¹¹As Flood stated in a letter to the Commissioner of Baseball:

After twelve years in the major leagues, I do not feel that I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system which produces that result violates my basic rights as a citizen and is inconsistent with the laws of the several states.

Brief for Petitioner at 5, *Flood v. Kuhn*, 407 U.S. 258 (1972).

The reserve system is really an option clause which permits the club to, within ten days of March 1, tender a one-year contract to players reticent to bargain a longer, more common contract. If the player wishes to continue to play baseball, he must sign the contract which contains another option clause, so that into perpetuity, as long as the club is interested in exercising this option, the player has no say whatsoever in terms of his playing conditions. He signs the option contract, negotiates a new contract, or looks for a new profession. See J. DURSO, *THE ALL-AMERICAN DOLLAR: THE BIG BUSINESS OF SPORTS* 148-49 (1971). See also section 10 of Uniform Players' Contract, *supra* note 9.

¹²*Flood v. Kuhn*, 309 F. Supp. 793 (S.D.N.Y. 1970).

¹³*Flood v. Kuhn*, 443 F.2d 264 (2d Cir. 1971).

¹⁴*Flood v. Kuhn*, 407 U.S. 258 (1972).

¹⁵*Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Federal Baseball v. National League*, 259 U.S. 200 (1922).

tended by Congress to be outside the scope of federal antitrust laws because it was effectively a "sport" and not a "business."¹⁶

Other court decisions in professional sports have rendered the baseball decisions an anomaly since boxing,¹⁷ football,¹⁸ hockey,¹⁹ and basketball²⁰ have all been considered subject to antitrust laws; thus, these sports are more properly businesses. In view of these cases, the rationale of *Flood* would appear incredible.²¹

B. Players' Associations

As in most major industries in the United States, unionism and the process of collective bargaining have made their impact, and each professional sport has its own players' association which represents players and negotiates conditions of employment which are incorporated into individual players' contracts.

¹⁶*Garadella v. Chandler*, 79 F. Supp. 260 (S.D.N.Y. 1948), *rev'd*, 172 F.2d 402 (2d Cir. 1949). See Note, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 HARV. L. REV. 418 (1967); Note, *Balance of Power in Professional Sports*, 22 MAINE L. REV. 459 (1970); Note, *Baseball's Antitrust Exemption and the Reserve System: Reappraisal of Anachronism*, 12 WM. & MARY L. REV. 859 (1971); 48 NOTRE DAME LAW. 460 (1972).

¹⁷*United States v. International Boxing Club*, 348 U.S. 236 (1955).

¹⁸*Radovich v. National Football League*, 352 U.S. 445 (1957).

¹⁹*Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972); *Petro v. Madison Square Garden Corp.*, 1938 TRADE CASES § 69, at 106 (S.D.N.Y. 1938).

²⁰*Haywood v. National Basketball Ass'n*, 401 U.S. 1204 (1971).

²¹As Mr. Justice Blackmun stated in *Flood*:

[T]he aberration is an established one, and one that has been recognized not only in *Federal Baseball* and *Toolson*, but in *Shubert*, *International Boxing*, and *Radovich*, as well, a total of five consecutive cases in this Court. It [baseball] is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs.

1. *Baseball*

The Major League Baseball Player's Association was organized in 1954 and since 1966 has proved to be effective in negotiations.²² Much of the success of the players' association in obtaining better benefits in terms of pensions, life and disability insurance, health care, minimum salaries, arbitration and grievance procedure, expense allowances, salary cut maximums, termination pay, representation at salary negotiations, negotiation of rules changes, and the application of "due process" in player discipline was due to the election of Marvin Miller as director of the players' association.²³ The era of good feelings between club and clubhouse ended and the players collectively began to challenge the "Papa-Knows-Best" theory of labor relations espoused by professional baseball club-owners.²⁴

The 1973 agreement provided for a three-year contract which was reported to provide in part for a minimum salary of \$15,000, an increase of \$1,500 from 1972 and an increase in the World Series winner's share of \$5,000 to \$20,000; the reserve clause would not be modified in exchange for binding arbitration of salary disputes; salary arbitration for a player with at least two consecutive years in the majors or three nonconsecutive seasons and the rule allowing for a maximum of twenty per cent salary cut in one year would still be effective; players with ten years of service in the major leagues (the last five with the same club)

²²This is the association that is known today. Others have existed since 1880.

²³R. SMITH, *BASEBALL* 406-16 (1947).

²⁴Several challenges to the structure of baseball have occurred within the past four years. Charles Finley received notice of an unfair labor practice for his firing a ballplayer in 1969. An increase was obtained in minimum salary to \$10,000 with the threat of a suit to challenge the reserve clause.

The year 1972 saw the first strike in baseball history. The two issues which caused the strike concerned the pension fund and the number of games to be played during the 1972 season. Originally, the players had asked for a 17% increase in fund benefits or \$1 million. A settlement was reached on \$500,000. The second issue concerned the number of games that should be played during the season. The players agreed to play a full season for full pay, but the American League clubowners favored beginning the season on April 15, 1972. The National League clubowners, on the other hand, desired a full slate of 162 games. The National League eventually dropped its demand and the season opened on April 15th with the players losing nine days' pay. See R. SMITH, *BASEBALL* 413-16 (1947).

would not be traded without their consent; a player would be placed on waivers only once (instead of twice) without the waivers being irrevocable; also, spring training allowances would be increased by an undisclosed amount and other benefits would increase substantially.²⁵ While the reserve clause still stands in professional baseball, at least for three more years, unless there are congressional restrictions, it is increasingly apparent that collective bargaining has become a strong force in determining the conditions under which professional baseball is seen today.

2. Football

While the reserve clause in baseball ties a player permanently to the club lawfully holding his contract and, thus (according to baseball club owners) ensures player equity among teams, professional football has adopted a variation of this idea known as an option clause. The option clause,²⁶ while less restrictive, is due neither to the benevolence of club owners nor to effective collective bargaining on the part of the players' association, but rather to the application of the antitrust laws to professional football in *Radovich v. National Football League*.²⁷ The option clause provides that a club may unilaterally renew a player's contract for one year for no less than ninety per cent of his former salary. The player may either play the additional year or sit out the season. He then becomes a "free agent" and may sell his services to any club. This

²⁵See Basic Agreement Between the American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs and Major League Baseball Players Association 1-44.

²⁶Standard Player Contract for Major Professional Football Operations as Conducted by the National Football League § 10, in COUNSELING PROFESSIONAL ATHLETES AND ENTERTAINERS 377, 381 (1970):

The Club may, by sending notice in writing to the Player, on or before the first day of May following the football season referred to in Par. 1 hereof, renew his contract for a further term of one (1) year on the same terms as are provided by this contract, except that (1) the Club may fix the rate of compensation to be paid by the Club to the Player during said further terms, which rate of compensation shall not be less than ninety percent (90%) of the sum set forth in Par. 3 hereof, and shall be payable in installments during the football season in such terms as provided in Par 3; and (2) after such renewal this contract shall not include a further option to the Club to renew his contract.

²⁷352 U.S. 445 (1957).

system was challenged in *Dallas Football Club v. Harris*²⁸ and the court held that the option clause was not unreasonable and could be enforced in equity.²⁹ To the option clause, however, is also attached what has come to be called the Rozelle Rule,³⁰ which provides that when a player plays out his option and becomes a free agent, he may sell his services to any club desiring him. But in the event that his former club feels that the free agent's new contract adversely affects them and player equity in the league, then, Pete Rozelle, the Commissioner of Football, may award the former club one or more players from the Active Reserve or Selection List of the club acquiring the free agent or any of the acquiring club's future draft choices. The effect of the Rozelle Rule is to give some control to the distribution of players in the National Football League, but in a less restrictive way than baseball's reserve clause. No doubt this arrangement may also be thought to restrict a player's right to sell his services and thus violate the antitrust laws, but this issue has not yet been decided.

Collective bargaining in professional football was a product of the 1960's and has established a parallel course to bargaining in baseball. The threat of a player strike in 1968 over pension fund provisions resulted in a two-year contract which provided for a three million dollar contribution by club owners to the player pension fund. The players' association has thus had a significant

²⁸348 S.W.2d 37 (Tex. Civ. App. 1961).

²⁹*Id.* at 49. See also Note, *Antitrust and Professional Sports: Does Anyone Play by the Rules of the Game?*, 22 CATH. U.L. REV. 403, 412 (1973).

³⁰The Rozelle Rule is so termed due to the power bestowed on the Commissioner of Football, Peter Rozelle. The rule states:

Any player, whose contract with a League Club has expired, shall thereupon become a free agent and shall no longer be considered a member of that club following the expiration date of such contract. Whenever a player, becoming a free agent in such manner, thereafter signs a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League Clubs, the Commissioner may name and then award to the former club one or more players from the Active Reserve or Selection List (including future selection choices) of the acquiring club as the Commissioner, in his sole discretion, deems fair and equitable; any such decision by the Commissioner shall be final and conclusive.

National Football League Constitution and By Laws art. XII, § 3, *as amended* (Jan. 29, 1963).

financial impact on professional football clubowners but has had no effect in altering the option clause.

3. Basketball

Professional basketball also has an option clause similar to the reserve clause of professional baseball.³¹ The players' association in the National Basketball Association, like its counterpart in professional baseball, has not had any impact in mitigating the effect of the option clause. The courts, however, have altered the option clause arrangement. In *Central New York Basketball, Inc. v. Barnett*,³² Dick Barnett, a member of the Syracuse Nationals, attempted to jump to the new, but now defunct, American Basketball League to play with the Cleveland Pipers. Arguing that the club had the right to Barnett's services for one more year as provided in the contract, the Nationals attempted to enjoin Barnett. Barnett contended that the contract was void as a restraint of trade. The court agreed with the Nationals that after the option year, 1961-62, Barnett was free to contract with any other team. This view was also taken in *Lemat Corp. v. Barry*³³ in which the plaintiff, Rick Barry, argued that the National Basketball Association's option clause was an adhesion contract. Rick Barry, one of the

³¹National Basketball Association Uniform Players Contract § 24 provides:

On or before September 1 next following the last playing season covered by this contract and renewals and extensions thereof, the Club may tender to the Player a contract for the next succeeding season by mailing the same to the Player at his address shown below, or if none is shown, then at his address last known to the Club. If the Player fails, neglects, or omits to sign and return such contract to the Club so that the Club renews it on or before October 1st next succeeding, then this contract shall be deemed renewed and extended for the period of one year, upon the same terms and conditions in all respects as are provided herein, except that the compensation payable to the Player shall be the sum provided in the contract tendered to the Player pursuant to the provisions hereof, which compensation shall in no event be less than 75% of the compensation payable to the Player for the last playing season covered by this contract and renewals and extensions thereof.

The Club's right to renew this contract, as herein provided, and the promise of the Player not to play otherwise than for the Club and its assignees, have been taken into consideration in determining the amount payable under paragraph 2 hereof.

³²19 Ohio App. 2d 130, 181 N.E.2d 506 (1961).

³³275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (1969).

most sought after college basketball players, had signed a contract with the San Francisco Warriors of the NBA for the 1965-66 season. He then signed a second contract with the Warriors for 1966-67. The American Basketball Association had then been organized, and the Oakland Oaks of that league offered Barry a substantial increase in salary to jump leagues. Barry signed a contract with the Oaks for the 1967-68 season. The Lemat Corporation sought to have the Warrior contract enforced and obtained an injunction against Barry to prevent his playing with the Oaks. Barry refused to honor the option year with the Warriors and did not play basketball during the 1967-68 season. The next year, 1968-69, Barry began to play for the Oaks. Lemat again sought to enjoin him, but the court held that "any agreement that limits a person's ability to follow his vocation must be strictly construed"³⁴ against the superior party. Thus, this contract was construed in favor of Barry similar to the manner in which the court had construed the contract in *Barnett*.

The players' association which began in the early 1960's with Oscar Robertson as the head and a young New York lawyer, Larry Fleischer, as its attorney, has had an organizational pattern similar to the players' association in professional football and baseball. The association immediately demanded that clubs increase their contributions to the pension fund and that certain contract provisions, most notably the option clause, be subject to bargaining. The players threatened to cancel the playoffs for the 1966-67 season if their demands were not met. Walter Kennedy, the Commissioner of the NBA, promised the players that he would present their demands to the clubowners at the end of the season. The players received an increase in the pension fund up to \$500 per month for a man with ten years in the NBA. The league also agreed to review the contract. However, there was no direct challenge to the reserve clause during that season.

The ABA directly challenged the NBA's option clause by introducing its own³⁵ which, like football's, was less restrictive and

³⁴*Id.* at 678, 80 Cal. Rptr. at 245.

³⁵American Basketball Association Uniform Players' Contract § 15, Option to Renew:

On or before the date of the expiration of this contract, the CLUB may, upon notice in writing to the PLAYER, review this contract for the further term of one (1) year following said expira-

permitted a player to leave the club after the option year. The presence of the ABA also gave the NBA players added bargaining strength, but they were not able to alter the option clause. Eventually, however, this goal was achieved in the suit denying the injunction against Barry.³⁶

4. *Hockey*

Hockey is one of the fastest growing professional sports in the United States. Like professional baseball, football, and basketball, hockey has seen several attempts to unionize the players which culminated in the formation of the present players' association in 1967. The players' association has achieved significant progress in the areas of wages and working conditions.³⁷ But, like their brothers in other professional sports, hockey players have been unable to modify the reserve clause which perpetually binds hockey players to a club in the same manner as the reserve system

tion date on the same terms as are provided by this contract, except that:

a. The CLUB may fix the rate of compensation to be paid by the CLUB to the PLAYER during said period of renewal, which compensation shall not be less than ninety per cent (90%) of the amount paid by the CLUB to the PLAYER during the preceding season, and

b. After such renewal, this contract shall not include any further option to the CLUB to renew the contract. The compensation in subsection a. herein shall mean only the salary as prescribed in paragraph 2. above.

³⁶L. KOPPETT, 24 SECONDS TO SHOOT: AN INFORMAL HISTORY OF THE NATIONAL BASKETBALL ASSOCIATION 173-91 (1968).

³⁷Since its inception, the players' association has negotiated a pension plan which permits players to take pension at either age forty-five or sixty-five. If a player elects to take pension at forty-five, he will receive \$300 a year for each year of service in hockey. If he takes his pension at the age of sixty-five, he will receive \$1,000 a year for each year of service. In 1972, the players' association was able to get the club owners to increase the Stanley Cup playoff money from \$7,500 per player for the winners to \$15,000 per player for the winner and \$2,500 per player on the losing team. Players also receive \$2,000 for being selected for the all-star team chosen by the Professional Hockey Writers' Association. Additionally, players would receive \$600 for a ten-game exhibition season and training tables have been discontinued at training camps for a \$12 a day allowance for meals. See G. ESKENAZI, A THINKING MAN'S GUIDE TO PRO HOCKEY 131-83 (1972).

in baseball.³⁸ Judge Higginbotham noted in his findings of fact in *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*³⁹ that the "owners have been insistent on the continuation of the reserve clause basically in its present form, and the players have . . . been consistently against this type of reserve clause."⁴⁰

The dimensions of collective bargaining in the various professional sports have been remarkably similar. The players' associations in professional football, basketball, baseball, and hockey have become viable organizations during the middle sixties and have all made great strides, particularly in the areas of pension funds, minimum salary, playoff money, training camp rules, and due process in the discipline of players. Of course, maximum salaries have also risen dramatically, although this is the result of individual bargaining, arbitration of salaries, and the increased demand for athletes due to the presence of additional leagues in

³⁸The National Hockey League Standard Player's Contract § 17 provides:

The Club agrees that it will on or before September 1st (August 10th, in the case of protected players and those who played fifty NHL games in the preceding season) next following the season covered by this contract, tender to the Player personally or by mail directed to the Player at his address set out below his signature hereto, a contract upon the same terms as this contract save as to salary. The Player hereby undertakes that he will at the request of the Club enter into a contract for the following playing season upon the same terms and conditions as this contract save as to salary which shall be determined by mutual agreement, failing which, by arbitration under the Arbitration Agreement between the League and the NHL Player's Association dated March 29, 1972.

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§ 19. The Player agrees that the Club's right to renew this contract as provided in Section 17 . . . [has] been taken into consideration in determining the salary payable to the Player

NHL President Clarence Campbell announced on December 3, 1973, that the NHL has abolished its controversial reserve clause system and will allow a player to play out his option and become a free agent.

³⁹351 F. Supp. 462 (E.D. Pa. 1972). This case was an antitrust suit by the Philadelphia World Hockey Club, Inc. (the Philadelphia Blazers of the new World Hockey Association) against the Philadelphia Hockey Club, Inc. (the Philadelphia Flyers of the National Hockey League) to enjoin the NHL from enforcing its reserve clause and preventing John McKenzie from jumping to the WHA.

⁴⁰*Id.* at 484.

three of the four major sports. The increased salaries have had little to do with the collective bargaining mechanism except that collective bargaining has brought about arbitration when disputes or holdouts occur between players and clubs over the matter of salary. These improvements and the solidification of bargaining have occurred simultaneously with the expansion of the National Football League, the National Basketball Association, and the National Hockey League as well as both the National and American Leagues in professional baseball and the appearance of three new rivals: The American Football League, the American Basketball Association, and the World Hockey Association, which have increased the demand for professional athletes and noticeably increased player salaries. No doubt much of this expansion is due to public interest in sports.⁴¹ But accompanying this interest is also the ability to pay as provided by the noticeable increase in disposable personal income in the United States. The single most important reason, however, for this tremendous expansion of professional athletics is television which has brought millions of dollars to professional athletes from the advertising industry.⁴² While the presence of television sports coverage has provided increased club receipts, it has so escalated player salaries that many club owners claim that they are climbing too fast and if the salaries cannot be reduced, many of the clubs will fail financially.⁴³ In football,

⁴¹Between 1960 and 1972, fifteen baseball stadiums, costing from a minimum of \$15 million to a maximum of \$51 million and seating from 42,500 to 75,000, were constructed.

⁴²By the 1970 season, television had provided football with the following money:

College and pros	\$62,500,000
Local radio rights for NFL games	\$2,100,000
Local preseason rights for NFL games	\$375,000
Local radio and delayed TV rights for 125 college games ..	\$1,305,375

Besides football, Columbia Broadcasting System has contracted to carry the ABA playoffs, National Broadcasting Company carries the NHL Stanley Cup playoffs and weekly professional baseball games, and the American Broadcasting Company carries the NBA games, not to mention numerous local television contracts to provide sports coverage in local and regional areas. See J. DURSO, *THE ALL-AMERICAN DOLLAR: THE BIG BUSINESS OF SPORTS* 256 (1971).

⁴³Shortly after World War II, the All-America Conference made a short-lived attempt to compete with the established National Professional Football League. The result was bankruptcy and the demise of the teams

the two leagues have merged and eliminated competitive bidding for players. The ABA is presently seeking a merger with the NBA in an effort to follow the example of professional football. Certainly professional hockey will experience the same effort in the next few years. The relationship between the two football leagues was marked by antitrust suits to obtain free access to players⁴⁴ and to provide additional leverage in establishing a merger. The players' associations have also attempted to free players from the restraints of restrictive reserve and option clauses so that they might enjoy lucrative effects of supply and demand created by the presence of the new leagues. The associations have failed to eliminate the reserve clauses and all of the contracts agreed upon by club owners and associations have, at most, provided for the arbitration of salaries. The only alternative was for individual players to sue the clubowners on the theory that their contracts were in fact restraints of trade and thus illegal under the Sherman Act.

II. ANTITRUST LAWS AND THE LABOR LAW EXEMPTION

A. Background

The expansion of collective bargaining in professional athletics also raised certain legal questions in the contract disputes of athletes in the late 1960's and early 1970's. The arguments that the reserve system is a mandatory subject of collective bargaining and that federal labor policy exempts the reserve system from the antitrust laws were advanced in *Flood* but these issues were not decided.⁴⁵ This theory was initially raised in a 1971 article attacking the professional athlete's right to sue on the players' contract.⁴⁶ The article argued that Curt Flood, who was then leading an individual attack on the reserve clause via the courts, was barred from initiating a suit on a contract which was the result of collective bargaining. The article relied upon *J. I. Case Co. v. NLRB*.⁴⁷

in the Conference with a few of the more promising Conference teams being taken into the National Professional Football League.

⁴⁴American Football League v. National Football League, 205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963).

⁴⁵See note 7 *supra*.

⁴⁶Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971) [hereinafter cited as Jacobs & Winter].

⁴⁷321 U.S. 332 (1944).

In that case, the employer, J. I. Case Co., refused to bargain with the union and contended that the company had pre-existing individual contracts which would be breached if it established a collective agreement covering all employees. The Court first described the relationship among the employer, employee, and union in light of the labor philosophy of the Wagner Act⁴⁸—*i.e.*, that after a collective agreement is made, the employer is then free to accept those he will employ or discharge; “the terms of the employment already have been traded out. There is little left to the individual agreement except the act of hiring.”⁴⁹ The primary question which the Court had to determine was whether the collective agreement superseded the individual contracts. The Court, in light of the philosophy of recognizing labor organizations and promoting industrial peace, held that the collective agreement was to be given priority over the individual contracts.⁵⁰

⁴⁸29 U.S.C. § 158 (1970).

⁴⁹321 U.S. at 335.

⁵⁰As the Court stated:

But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits, any more than a shipper can contract away the benefit of filed tariffs, the insurer the benefit of standard provisions, or the utility customer the benefit of legally established rates.

Id. at 336.

Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement.

Id. at 337.

It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group.

The implications of *J. I. Case* are that since professional athletic contracts are the product of collective bargaining between club owners and the players' associations, there is no standing for an individual player to sue on the contract simply because he does not find the terms favorable. Thus, any individual player cannot challenge the reserve or option clause. This argument was urged in *Flood*, but was never considered since the Court found it unnecessary to go beyond the historical considerations that baseball as a sport is not subject to the antitrust laws.⁵¹

The second line of thought the article pursued is that antitrust principles should not apply between employers and employees engaged in collective bargaining.⁵² Collective bargaining is per se collusive in that it binds employees together to bargain with an employer or employers on terms of employment which are mutually agreeable to both parties. The terms of wages, hours, and working conditions are thus fixed and not subject to the interaction of supply or demand in a more classical sense. From the view of classical economics, unions and collective agreements are impediments in the market and when unions bargain in monopolistic and oligopolistic industries, this process has been referred to as bilateral monopoly.⁵³ Thus, the fact that the reserve clause may be part of a monopolistic effort would not be violative of the Sherman Act since the collective agreement is exempted from the Sherman Act.⁵⁴

Id. at 338.

We cannot except individual contracts generally from the operation of collective ones because some may be more individually advantageous.

Id. at 339.

⁵¹407 U.S. at 248.

⁵²Jacobs & Winter 21-28.

⁵³*Id.* at 22.

⁵⁴Section 6 of the Clayton Act, 15 U.S.C. § 17 (1970), provides:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be

The labor exemption to the Sherman Act, although established in 1914 in the Clayton Act,⁵⁵ was not actually clarified until the decision of *United States v. Hutcheson*.⁵⁶ In *Hutcheson*, the United Brotherhood of Carpenters and Joiners of America struck Anheuser-Busch, Inc., when the company awarded to the International Association of Machinists certain jobs which the carpenters claimed should have been performed by them. A strike ensued. The company maintained that the strike violated the Sherman Act. The trial court upheld a demurrer to the charge and stated that unions were exempt from the Sherman Act.⁵⁷ The Supreme Court affirmed the lower court's ruling: "the facts here charged constitute lawful conduct under the Clayton Act unless the defendants cannot invoke that act because outsiders to the immediate dispute also shared in the conduct."⁵⁸

The issue of the labor exemption to the antitrust laws was again raised in *Allen-Bradley Co. v. Local 3, Electrical Workers*.⁵⁹ In that case, the union had organized most of the employees of the electrical manufacturers and contractors in the New York area. The terms of the collective agreements provided that the manufacturers would sell only to those contractors with whom Local 3 had contracts. Conversely, the contractors agreed to buy from only those manufacturers who also held contracts with Local 3. Excluded manufacturers brought an antitrust action

illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 20 of the Clayton Act, 29 U.S.C. § 52 (1970), provides:

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employees, or between persons employed and persons seeking employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

⁵⁵15 U.S.C. § 17 (1970).

⁵⁶312 U.S. 219 (1941).

⁵⁷*United States v. Hutcheson*, 32 F. Supp. 600 (E.D. Mo. 1940).

⁵⁸312 U.S. at 233.

⁵⁹325 U.S. 797 (1945).

against Local 3. The Supreme Court reversed the appellate court⁶⁰ and held that such agreements violated the Sherman Act and that a "business monopoly is no less such because a union participates, and such participation is a violation of the Act."⁶¹

In *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,⁶² the Meat Cutters' Union had entered into an agreement with several employers which provided that market operating hours would be from 9:00 a.m. to 6:00 p.m., Monday through Saturday, and that no customer should be permitted into the market before or after those hours.⁶³ One of the companies to the agreement, Jewel Tea, signed reluctantly and then sued the union on the ground that the trade agreement violated the Sherman Act. Jewel Tea specifically charged that its stores were equipped to vend meat in a prepackaged, self-service fashion and that the presence of a butcher was unnecessary; thus, the trade agreement restrained Jewel Tea from using its facilities before or after the hours designated in the trade agreement.

Mr. Justice White, writing the majority opinion, commented that the major issue in the case was whether the marketing-hours restriction was so tied to wages, hours, and working conditions and the result of good-faith, arms-length bargaining, not of a combination with nonlabor groups, that it fell within the protection of the national labor policy which exempts labor and collective agreements from the Sherman Act.⁶⁴ He adhered to the theory behind the labor exemption that collective bargaining agreements are per se restraints of trade in that they preclude individuals in the collective unit from bargaining individually, except in rare cases in which the collective agreement permits bargaining by individuals, and they preclude management from dealing with any other labor union. But the policy behind the exemption promotes the recognition of the labor movement and the importance of ensuring industrial peace at the expense of the trade laws.

⁶⁰*Allen-Bradley Co. v. Local 3, Electrical Workers*, 145 F.2d 215 (2d Cir. 1945).

⁶¹325 U.S. at 811.

⁶²381 U.S. 676 (1965).

⁶³*Id.* at 679-80.

⁶⁴*Id.* at 691.

Mr. Justice Goldberg, in a concurring opinion, stated that the issues in question were "mandatory subjects of bargaining."⁶⁵ "To tell the parties that they must bargain about a point but may be subject to antitrust penalties if they reach an agreement is to stultify the congressional scheme."⁶⁶

In *United Mine Workers v. Pennington*,⁶⁷ decided at the same time as *Jewel Tea*, the Court again reviewed the labor exemption to the antitrust laws. The United Mine Workers had entered into a collective agreement with the larger mining companies designed to end overproduction in the market by eliminating the smaller companies. This was to be achieved by making the smaller companies meet the higher pay scales that had already been agreed upon by the union and larger mine owners. Since the smaller companies would not be able to meet this higher pay standard, they would be forced out of business. The trustees of the union sued one small mining company for royalty payments due the miners' retirement fund as provided under the wage agreement. The company crossclaimed that the union's agreement with the large mining companies violated the Sherman Act. The trial court set aside a verdict against the union and the appellate court affirmed.⁶⁸ The Supreme Court, however, reversed and remanded the case on the grounds that "one group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy."⁶⁹ The union was considered part of a conspiracy even though it could "secure the same wages, hours, or other conditions of employment from the remaining employers"⁷⁰

Thus, the crucial point is that antitrust liability is founded on a situation in which unions have entered into collective agreements with the employers which are specifically designed to damage the employer's competitors. The thrust of this viewpoint is

⁶⁵*Id.* at 711.

⁶⁶*Id.* at 711-12.

⁶⁷381 U.S. 657 (1965).

⁶⁸*Pennington v. United Mine Workers*, 325 F.2d 804 (6th Cir. 1963).

⁶⁹381 U.S. at 665-66.

⁷⁰*Id.* at 666.

that if individual players challenge restrictive reserve or option clauses allegedly negotiated by the players' associations and the club owners, the agreement will only constitute a violation of the Sherman Act when some competitor has been damaged by the trade agreement. Under the rationale of *J. I. Case*, however, players have no standing to challenge the agreement. Thus, Flood could not challenge the reserve clause any more than a butcher could challenge the *Jewel Tea* agreement restricting him from working after 6:00 p.m. in the meat markets of Jewel Tea.⁷¹ To permit such suits would undermine collective bargaining by subverting the authority of collective units to represent and bind their members and would further "involve the courts in rewriting potentially every collective agreement in the country at the behest of individual employees."⁷²

B. The Product and Labor Markets

Apparently, the labor market is distinct from the product market, and the Sherman Act applies only to the product market. Thus, any restraints of labor or monopolization of labor could not be prohibited under the Sherman Act.

C. Implications

The above theories indicate that any professional athlete, to the extent that he is represented by a players' association, is not only incapable of raising an antitrust question, but is powerless to sue on his contract. Thus Flood would have been barred from suing and professional basketball players would have no standing to challenge the proposed merger of the ABA and the NBA.⁷³ Since the presence of the WHA in professional hockey and the higher salaries being offered due to the increased demand for hockey players, players traditionally contracted with NHL teams are playing out their contracts and trying to jump to the new league. These players, like Flood, would also be barred from

⁷¹Jacobs & Winter 27.

⁷²*Id.*

⁷³*Id.* An antitrust suit was filed by the ABA against the NBA but later dropped as part of a settlement under which both leagues would pursue a merger. It is reported that the NBA is dragging its feet on the merger proposal and, thus, litigation may be renewed.

challenging the reserve clauses in their contracts as violative of the antitrust laws.⁷⁴

III. SUITS BY INDIVIDUAL PLAYERS AND COMPETITORS

A. *Competitor's Suits*

Although the labor exemption to the antitrust laws was not considered in *Flood*, the theory has been argued in professional hockey cases in which players are seeking to free themselves for the more lucrative offers of the market and competitors are joining in the fray in an attempt to get equal access to players in the market. In the recent case of the *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*,⁷⁵ five suits involving the attempts of a NHL player, John McKenzie, and several WHA teams to strike down the reserve clause of the NHL as a violation of the antitrust laws were joined. Judge Higginbotham, in considering the labor exemption to the antitrust laws, noted that the Court in *Pennington* had indicated that

there are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws.⁷⁶

It is particularly crucial for a violation of the Sherman Act that unions and employers conspire to restrain a competitor and thus monopolize the market. Neither unions nor employers will be shielded from the antitrust laws when they act independently or in concert with nonlabor groups to effectuate wage policies which restrain trade.⁷⁷ Thus employers and unions will not be exempted from the Sherman Act solely because one party to an agreement is a labor organization. The *Allen-Bradley* and *Pen-*

⁷⁴*Id.* at 28. Jacobs and Winter did not deal with the merits of a rival league's seeking to have free access to players bound by reserve clauses to the traditional league. As they stated, "We express no opinion on the merits of claims by rival leagues or maverick owners." *Id.* Although no reason is given for this position, it would seem that the authors may have been aware of the success of the AFL in challenging the NFL's control over football players as a monopoly.

⁷⁵351 F. Supp. 462 (E.D. Pa. 1972).

⁷⁶*Id.* at 498.

⁷⁷*Id.* at 499-500.

nington cases involved situations in which a competitor's trade had been restrained by the collusive agreement of another employer and a union and, in each of these cases, the competitor challenged the union's agreement to a collective bargaining contract as being a violation of the Sherman Act. The question in each of these cases was whether the fact that the defendant was a union would exempt it from the antitrust laws. The Court answered the question in the negative: the exemption was not designed to free unions or employers from the antitrust laws so that they might engage in collusive activity. Thus, when the WHA challenges the NHL on the grounds that the latter's collective agreement or reserve clause prohibits the WHA from competing for players, the NHL cannot take advantage of the labor exemption to shield itself from antitrust liability.

The *Jewel Tea* case involved a company's challenging the agreement that it made with the union as being a restraint of the company's (*Jewel Tea's*) trade. The court indicated that when the agreement was reached "*through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with non-labor groups.*"⁷⁸ the agreement falls within the national labor exemption to the Sherman Act. "The crucial determinant is not the form of the agreement—e.g., prices or wages—but its *relative impact* on the *product market* and the *interests of union members.*"⁷⁹

Jewel Tea involved union demands challenged as antitrust violations similar to the union's conspiratorial role in *Allen-Bradley* and *Pennington*. The players' associations in all professional sports have been opposed to reserve clauses but have been unable to modify them. Thus, the role of the players' associations is opposite that of the unions in *Allen-Bradley*, *Pennington*, and *Jewel Tea*. Additionally, there is little evidence, as Judge Higginbotham indicated, that the reserve clause "was ever a subject of serious, intensive, arm's-length collective bargaining."⁸⁰ Even if there had been substantial arm's-length bargaining, the NHL is not in a position to use the form of the union to shield it from antitrust liability. The argument is a mythological ma-

⁷⁸*Id.* at 498, quoting from *United Mine Workers v. Pennington*, 381 U.S. 657, 689-90 (1965).

⁷⁹*Id.*

⁸⁰*Id.* at 499.

neuvering with all the religious candor of a theory and a line of cases which were never intended to protect unions or employers from antitrust violations.⁸¹ In reality, the NHL occupies a position similar to the union in *Allen-Bradley* and *Pennington*: it is involved in a union-employer combination to exclude others, especially newcomers, from the market. What is viewed as a shield becomes a sword for engaging in monopolistic competition.⁸²

B. *Individual Suits*

While it seems that the reserve clause will not stand when challenged by a new league as a competitor and that the labor exemption should not be permitted as an illusory bar to such suits, a more difficult question would seem to be: May an individual player as a member of an authorized players' association challenge the terms of his contract when such terms have in large part been the result of collective bargaining between the players' association and the clubowners?

1. *Individual Contracts*

A preliminary question that must be raised is what do the current Uniform Standard Players' Contracts used in all professional athletics mean? Are they individual contracts for personal services or collective bargaining agreements under which the individual has no right of action, as the clubowners would seem to interpret them? Based upon the intention of the parties and the historical line of cases enjoining athletes from appearing elsewhere or from jumping leagues,⁸³ the proper view of these agreements would suggest that the contract is a personal one, between a certain player and the team for a salary which is for the most part negotiated by the player and the club as the contracts indicate in very bold print. They are not contracts between the club and the players' association albeit some of the terms of the collective agreement appear in the individual contracts. When an individual athlete is sought to be enjoined by a team, the argument is based upon the old and well studied case, *Lumley v. Wagner*.⁸⁴ In that case, the court enjoined a concert singer from

⁸¹381 U.S. at 665-66.

⁸²351 F. Supp. at 499-500.

⁸³See note 9 *supra*.

⁸⁴42 Eng. Rep. 687 (Ch. 1852).

performing anywhere else for anyone else during the time she was under contract to the plaintiff. The cases involving contract jumping argue the rationale of *Lumley* that an athlete's services are of a specific, personal nature and, thus, damages would be inadequate and equity ought to enjoin the athlete⁸⁵ from playing for any team other than the plaintiff team which insists that it has a valid contract with the player. The validity of the contract would be a matter for a separate hearing on the merits but what is important is that player contracts are contracts of personal service and not collective agreements. The individual player and team would each have the right to sue on breach of the contract or to test the legality of the contract.

2. Collective Contracts

If these contracts are collective agreements under which the individual player has no right of action, the individual is not totally precluded from bringing an action as indicated by the situation in *J. I. Case*. The Court has not precluded individual suits under collective agreements although the Court has been especially cautious in hearing individual cases in order to avoid the deluge of litigation that might befall the Court and, thus, undermine national labor policy. As the Court stated in *J. I. Case*, when there is great variation in the circumstances of employment or capacity of employees, the collective agreement may designate or leave certain areas open to individual bargaining.⁸⁶ In other

⁸⁵See *Munchak Corp. v. Cunningham*, 457 F.2d 721 (4th Cir. 1972); *Houston Oilers, Inc. v. Neely*, 361 F.2d 36 (10th Cir.), *cert. denied*, 385 U.S. 840 (1966); *Madison Square Garden Corp. v. Carnera*, 52 F.2d 47 (2d Cir. 1931); *Shubert Theatrical Co. v. Ruth*, 271 F. 827 (2d Cir. 1921); *Lemat Corp. v. Barry*, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (1969); *Philadelphia Ball Club, Ltd. v. Lajoie*, 202 Pa. 210, 51 A. 973 (1902).

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We are not called upon to say that under no circumstances can an individual enforce an agreement more advantageous than a collective agreement, but we find the mere possibility that such agreements might be made no ground for holding generally that individual contracts may survive or surmount collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. *Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining.*

321 U.S. at 338 (emphasis added).

words, individual contracts may in fact surmount collective agreements and there may be situations in which, due to a variation in circumstances of employment and skill, individual agreements may be within the overall framework of the collective agreement.

The problem is primarily a philosophical one involving an attempt to define the individual's relationship to the union and the individual's rights under the collective agreement. The interpretations indicate that the individual stands in the position of a third party beneficiary to the agreement, that the union is an agent which finds its members as principals, or that the relationship may be viewed as a type of constitutional government in which the members elect the union administrators who perform the bargaining tasks. But regardless of the philosophical position, it seems that the individual as "principal," third-party beneficiary, or member of a constitutional system would properly have the right to sue on the collective agreement.

Congress, however, in order to implement consistent labor policy, passed section 301 of the Labor Management Relations Act,⁸⁷ which provides that an individual union member may bring a suit in any federal district court for violations by a union or employer of a labor contract. Notwithstanding case law precluding section 301 suits, an individual athlete may have the right to sue given recent developments in the area of section 301.

In 1955, in *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*,⁸⁸ the United States Supreme Court held that section 301 was not intended to authorize accrued wages since such claims involved individual claims of uniquely personal rights. The Court, however, dealt with section 301 two years later in *Textile Workers Union of America v. Lincoln Mills*.⁸⁹ In that case, the collective bargaining agreement provided for arbi-

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[S]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185 (1970).

⁸⁸348 U.S. 437 (1955).

⁸⁹353 U.S. 448 (1957).

tration of grievances. The union began the procedural process, but the employer refused to acknowledge the process. The union brought suit to compel arbitration. The Supreme Court agreed with the union's position and stated that the federal district court could order an employer to arbitrate grievances which were personal in an action brought under section 301.⁹⁰

Seven years later in *Humphrey v. Moore*,⁹¹ the Supreme Court entertained the next logical proposition which was a consideration of the individual's right to sue under section 301. Moore brought a class action seeking an injunction against the company and the union to keep them from combining the seniority lists of two transportation companies. The action was brought without first exhausting the administrative remedy of arbitration as provided by the collective agreement. The Supreme Court indicated that the subject matter was proper for federal jurisdiction under section 301 and that the union was not guilty of misrepresentation nor did it have to exhaust the grievance procedure.⁹² Thus, both unions and individuals had standing to sue under section 301.

The inroads into section 301 that had taken place from 1947 to 1965 were soon ended in *Republic Steel Corp. v. Maddox*.⁹³ In *Maddox*, an individual employee sued his employer for severance pay as provided by the collective bargaining contract. The trial court found for Maddox and the appellate court affirmed, but the Supreme Court, reversing the lower courts, stressed that section 301 will only be available to individuals when they have exhausted the grievance procedure delineated in the collective bargaining agreement or the union fails to properly represent them. The Court in *Maddox* relied on the decision of *Smith v. Evening News Association*⁹⁴ for the proposition that grievance procedures must be invoked before a suit may be brought under section 301. The *Smith* facts involved an employee of the Evening News Association and member of a labor organization, the Newspaper Guild of Detroit, with whom the company had a collective bargaining agreement. The petitioner brought a suit for breach of contract

⁹⁰*Id.*

⁹¹375 U.S. 335 (1964).

⁹²*Id.* at 344.

⁹³379 U.S. 650 (1965).

⁹⁴371 U.S. 195 (1962).

in the local circuit court. Another union had struck the employer, and the petitioner and other Guild members, although willing and able, were not permitted to work while other employees not covered by a collective bargaining agreement were permitted to work. Smith contended that this was a breach of the collective bargaining agreement which provided that there would be no discrimination against any employee because of membership in the Guild. The trial court dismissed for lack of jurisdiction and the Supreme Court of Michigan affirmed.⁹⁵ The Supreme Court, saying that the "petitioner's action arises under § 301,"⁹⁶ reversed and remanded. The Court stated in dicta that individual claims for wages or working conditions, even though they are intertwined with union interests, are directly within the ambit of section 301.⁹⁷ In light of the language of *Smith*, it is difficult to say that the Court intended to deny petitioner relief, particularly since the Supreme Court reversed the state courts and remanded the case. Thus, *Maddox* would seem to have misconstrued *Smith*.

However, two years later in *Vaca v. Sipes*,⁹⁸ the Court followed the *Maddox* rationale when an employee sued, claiming he had been wrongfully discharged in violation of the collective bargaining agreement and that the union refused to see his claim through the proper grievance procedure. The union began the grievance procedure but later suspended it and instructed the employee to settle with the employer. The employee refused and brought a section 301 action. In reversing the lower courts which had held that the employee had been wrongfully discharged, the Supreme Court held that if an individual employee had no absolute right to have a grievance arbitrated, then "a breach of the union's duty of fair representation is not established merely by proof that the underlying grievance is meritorious."⁹⁹ To recover there must have been "arbitrary or bad-faith conduct on the part of the union in processing the grievance."¹⁰⁰ This evidence was not provided. The effect of *Sipes* is to leave a wrong without a

⁹⁵*Smith v. Evening News Ass'n*, 362 Mich. 350, 106 N.W.2d 785 (1962).

⁹⁶371 U.S. at 201.

⁹⁷*Id.* at 200.

⁹⁸386 U.S. 171 (1967).

⁹⁹*Id.* at 195.

¹⁰⁰*Id.* at 193.

remedy—this suggests that the Court is denying recovery out of a fear of increased litigation.

Although *Maddox* and *Sipes* appear to have restricted the individual's right to sue under a collective agreement, there is some indication based upon recent decisions that the Supreme Court is returning to the rationale of *Smith v. Evening News Association*. In *United States Bulk Carriers, Inc. v. Arguelles*,¹⁰¹ the United States Supreme Court appears to have applied the dictum of *J. I. Case* and the philosophy of *Smith*, providing for the right of an individual to bring a section 301 action. *Arguelles* involved a suit for wages "brought by a seaman whose employment was covered by a collective bargaining agreement that provided grievance procedures and arbitration of disputed claims."¹⁰² The seaman bypassed arbitration and elected to file a suit in federal court. The Court was faced with the issue of whether section 301 was the only remedy available to seamen in view of statutory remedies in the maritime field. The Court held that section 301 was an optional remedy and, inasmuch as the employee had a justiciable claim that was "grist for the judicial mill,"¹⁰³ the seaman had the right to sue, particularly since seamen from the start were wards of admiralty law and thus different from other types of workers.¹⁰⁴

More recently in *Norfolk & Western Railway v. Nemitz*,¹⁰⁵ railroad employees sued their employer to recover compensation promised in an agreement with their union in 1962. The employer had agreed with the union that its members would not be adversely affected by a company merger. The Interstate Commerce Commission approved the merger, and the employer and the union entered into an agreement which substantially reduced employee benefits. The employees petitioned the union to arbitrate but were refused on the grounds that a new agreement had been entered into by the union. The employees then brought suit in

¹⁰¹400 U.S. 351 (1971).

¹⁰²Comment, *The Individual Worker's Right to Sue in His Own Name in a Collective Bargaining Situation*, 17 S.D.L. REV. 217, 232 (1972).

¹⁰³400 U.S. at 357.

¹⁰⁴Comment, *The Individual Worker's Right to Sue*, *supra* note 102, at 233.

¹⁰⁵404 U.S. 37 (1971).

federal court. The Supreme Court again disregarded *Maddox* and *Sipes* and ruled that section 5(2)(f) of the Interstate Commerce Act¹⁰⁶ directs the Interstate Commerce Commission to "require a fair and equitable arrangement to protect the interests of the railroad employees affected"¹⁰⁷ in order for the Commission to approve the merger. The Court also held that any protection provision must be effective for four years.¹⁰⁸ Although the third provision of the Act states that, notwithstanding any other provisions of the Act, an agreement protecting the interests of the employees can be entered into by any railroad carrier and the duly authorized representative or representatives of the employees,¹⁰⁹ the Court, in granting the employees' right to sue, interpreted the first two sections requiring protection of the employees' interests as pre-empting the third section which demands that the collective agreement be controlling as to the interests of employees.

The Court in *Arguelles* and *Nemitz* was searching for a way to deal with justiciable individual claims without flooding the courts with such claims. In so doing, the Court has sought to avoid *Maddox* and *Sipes* when a union employee has a legitimate cause of action under some other federal law. It would certainly seem, then, that Flood or any other professional athlete should be accorded such standing under the Sherman Act, notwithstanding *Maddox* or *Sipes*.

Although this theory has never been argued, two courts have dealt with professional athletic contracts in light of collective bargaining agreements and concluded that the contracts are individual contracts for personal services. In *Philadelphia Hockey Club*, Judge Higginbotham regarded professional hockey contracts as individual contracts that cannot be modified by arbitration agreements negotiated between the NHL and the NHL players' association unless specifically authorized by the individual player.¹¹⁰ Thus, a three-year restraint¹¹¹ of a hockey player following

¹⁰⁶49 U.S.C. § 5(2)(f) (1970).

¹⁰⁷*Id.*

¹⁰⁸404 U.S. at 42.

¹⁰⁹49 U.S.C. § 5(2)(f) (1970).

¹¹⁰351 F. Supp. at 507-08.

¹¹¹It has been argued by the NHL that players should be enjoined for three years beyond their contract rather than permanently.

the expiration of his contract is unreasonable and in violation of section 2 of the Sherman Act.¹¹²

More recently in *Nassau Sports v. Peters*,¹¹³ the defendant Peters jumped from the New York Islanders of the NHL to the WHA's New York Raiders and was enjoined from leaving the Islanders under the terms of the NHL contract. The court held that the controversy between the plaintiff and Peters was not a labor dispute and did not involve a labor contract. "The contract is purely and simply one for unique personal services to be rendered by an individual."¹¹⁴

The decisions that have occurred in professional athletics since *Flood* have considered the argument that standard player contracts are collective bargaining agreements and have rejected the contention.¹¹⁵ However, courts have reached decisions contrary to *Flood* in *Philadelphia Hockey Club*, holding that the hockey reserve clause is invalid, and *Nassau Sports*, holding that the contract right must be held "in favor of plaintiff which must prevail over unproved and questionable defensive claims that such an option violates the antitrust laws."¹¹⁶ No doubt there will be many forthcoming appeals in this area in which the labor contract theory will be raised and which should be rejected as obfuscating the more realistic interpretation that professional athletic contracts are contracts for personal services. But under either interpretation, the athlete should have the right to sue under the contract to challenge its provisions.

IV. THE PECULIAR ECONOMICS OF PROFESSIONAL ATHLETICS

Professional baseball and hockey have utilized the most restrictive of the reserve clauses while professional football and basketball have been forced through judicial decisions to adopt

¹¹²351 F. Supp. at 508.

¹¹³352 F. Supp. 870 (E.D.N.Y. 1972).

¹¹⁴*Id.* at 882.

¹¹⁵*Nassau Sports v. Peters*, 352 F. Supp. 870 (E.D.N.Y. 1972); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972).

¹¹⁶352 F. Supp. at 882.

more flexible option clauses, although there may be some question as to the flexibility of player freedom extended under the football option clause.¹¹⁷ The defense most frequently raised for the necessity of the reserve system is that it assures "an equal distribution of playing talent among opposing teams; that a more or less equal distribution of talent is necessary if there is to be uncertainty of outcome."¹¹⁸ It is crucial, of course, that there be uncertainty of outcome if the consumer is to desire to view athletic contests and pay the admission price to a game. The argument in favor of the reserve system is also based upon a fear of team failures similar to that which occurred in the late nineteenth century in professional baseball when the wealthier clubs outbid the poorer clubs for the most competent players. The players have contended that the reserve clause is a restraint of trade and provides a monopoly over the player market to the detriment of newly organized leagues, such as the WHA.

In reaction to reserve clause opposition, the clubs have emphasized that the clause ensures equality of team strength and that this fact is crucial in viewing the economics of professional athletics.¹¹⁹ If a team is to be successful, it must hope and ensure that "competitors also survive and prosper sufficiently so that the differences in the quality of play among teams are not too great."¹²⁰ In other words, the ideal place of most firms in American industry is as close to monopoly as possible, as close to total domination of the market and maximization of profit through the superiority of its product as will be permissible under the antitrust laws. Monopoly, however, for the professional sports

¹¹⁷It has been thought by some that there is a tacit agreement among clubowners to refrain from buying the services of a player who has played out his option and thus discourage players from acting as free agents. This charge has never been substantiated.

¹¹⁸D. WATSON, PRICE THEORY IN ACTION 342 (1969), reprinting Rottenberg, *The Baseball Players' Labor Market*, 64 J. POL. ECON. 242 (1956).

¹¹⁹

Professional team competitions are different from other kinds of business ventures. If a seller of shoes is able to capture the market and to cause other sellers of shoes to suffer losses and withdraw, the surviving competitor is a clear gainer.

Id. at 347.

¹²⁰*Id.*

team is disastrous.¹²¹ Thus, it is peculiar to the economics of athletics that profit maximization depends upon competition among the teams and not on business competition among the firms controlling the teams, "for the greater the economic collusion and the more the sporting competition the greater the profits."¹²² The implication which seemed in part to have swayed Congress in granting the football merger is that professional athletics are natural monopolies. Thus, the "several joint products [contests] which are joint products of legally separate business firms are really the complex joint products of one firm, [which] is necessarily an all-embracing firm or natural monopoly."¹²³

The general reaction to sports as a natural monopoly has been complicated in football by the emergence of the AFL, in basketball by the ABA, and now in hockey by the WHA. Curiously enough, baseball has merged its apparent oligopolistic firms into one monopoly. Thus, the American League and National League are really not two separate leagues, but rather two divisions within a single league of professional baseball. Ironically, the courts have subjected football to the antitrust laws, provided free access to players, and have in effect declared that two or more leagues must compete among themselves.¹²⁴ Congress, however, permitted the two leagues to merge and there is now one league with four divisions. Professional basketball is presently fighting on two fronts, in the courts and in Congress. The ABA

¹²¹*Id.* at 218-19, reprinting Neale, *The Peculiar Economics of Professional Sports*, 78 Q.J. ECON. 1 (1964). Mr. Neale has characterized monopoly in professional sports as the "Louis-Schmelling Paradox":

But now consider the position of the heavyweight champion of the world. He wants to earn more money, to maximize his profits. What does he need in order to do so? Obviously, a contender, and the stronger the contender the larger the profits from fighting him. And since doubt about the competition is what arouses interest, the demonstration effect will increase the incomes of lesser fighters (lower on the rating scale or lighter on the weighing scales). Pure monopoly is a disaster: Joe Louis would have had no one to fight and therefore no income.

Id. at 219.

¹²²*Id.*

¹²³*Id.* at 221.

¹²⁴*American Football League v. National Football League*, 205 F. Supp. 60, 64 (D. Md. 1962), *aff'd*, 323 F.2d 124, 131-32 (4th Cir. 1963).

desires a shortcut to a merger with the NBA through Congress and around the more expensive court litigation which may well separate the two leagues in view of the *American Football League v. National Football League* decision.¹²⁵ Professional hockey occupies the same position with the NHL squaring off with the WHA. The *Philadelphia World Hockey Club* decision indicates that hockey will also have to seek the more sympathetic ear of Congress.

The legal rationale involved in applying the antitrust laws to professional athletics has followed the decision of *United States v. Aluminum Co. of America*¹²⁶ that the monopolist must have both the power and intent to monopolize, although no specific intent is required, "for no monopolist monopolizes unconscious of what he is doing."¹²⁷ As a practical matter, the courts have looked at restrictive option clauses and geographical expansion of the older leagues as barring the new leagues from effective competition.¹²⁸

¹²⁵205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963). The AFL brought suit against the NFL and charged that the NFL monopolized football and restricted the AFL teams from access to the players. The AFL was unable to prove a conspiracy to monopolize or monopoly power on the part of the NFL.

¹²⁶148 F.2d 416 (2d Cir. 1945).

¹²⁷*Id.* at 432.

¹²⁸See *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 455, 504-13 (S.D.N.Y. 1972); *American Football League v. National Football League*, 205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963). See also Note, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 HARV. L. REV. 418 (1967).

The congressional and economic reasoning for merging professional athletic leagues into one league in each sport has grown out of a consideration for the effect of trying to keep two leagues economically and sportingly competitive, particularly in light of the bankruptcies of professional football teams during the forties. Economic competition demands that the team cover its costs of rent, equipment and stadium rent, reinvestment, transportation, and the cost of players. The cost of players has been regarded as payment for an unreproducible talent or unique service, or a quasi-rent. Unlike the rent and costs of retailers which would be relatively constant for competitors and permit those handling the same goods to exist in the same market area, professional athletics does not enjoy identical nonrental costs. Thus, transportation for some teams may be greater than in an opposing league and as competition bids up the cost or rent of players, the profit margin can only decline and teams will necessarily fail. This is particularly

In addition to the challenges from competing leagues, established leagues have also been under attack from the players. They are attacking the monopsonistic power of the teams in controlling the price of labor and, in effect, paying them a price which is less than the price they would receive in a competitive market; they are attacking the reserve clause as it restrains the athlete's ability to trade his services.¹²⁹ Under the present reserve clauses in baseball and hockey, it is doubtful that equality of ability is achieved among teams.¹³⁰ Whether a free market or free access to players would create more equality among teams is questionable and difficult to determine. It would, however, provide athletes with payment for the full value of their services without part of it being retained by the clubs.¹³¹

true for teams which geographically have not been receptive to certain sports or when expansion and diminishing returns in playing ability have occurred and discouraged consumer interest and gate receipts. The conclusion is that many individual teams will experience bankruptcy as costs steadily increase and eventually exceed revenues. The paradox is that the firm in law is not the firm in economics, and the concept of professional athletics as an economic unit demands exemption from the antitrust laws. Congress appears willing to provide this exemption. See Neal, *The Peculiar Economics of Professional Sports*, 78 Q.J. ECON. 1 (1964), reprinted in D. WATSON, PRICE THEORY IN ACTION 218-26 (1969).

¹²⁹Besides Flood's attack on baseball's reserve clause and the recent attacks on the NHL's reserve clause, the NBA and ABA basketball players have also challenged the merger of the two professional basketball leagues.

¹³⁰From 1920-51, the New York Yankees led the American League in eighteen years, and the Chicago White Sox in none. During the same period of time the National League saw the St. Louis Cardinals win in nine years, the New York Giants in eight, and the Philadelphia Phillies and Boston Braves each won one year. Rottenberg, *The Baseball Players' Labor Market*, 64 J. POL. ECON. 242 (1956), reprinted in D. WATSON, PRICE THEORY IN ACTION 342-43 (1969).

In professional hockey during the period 1946 to 1967 Montreal finished first nine times and second seven times. Detroit finished first nine times and second twice, while Boston finished last five times and fifth four times. New York finished last four times and fifth ten times and Toronto finished first twice, second five times, and last only once. Very little uncertainty seems to have resulted. Jones, *The Economics of the National Hockey League*, 2 CAN. J. ECON. 6 (1969).

¹³¹One of the most difficult problems in analyzing wages of professional athletes is that there is little information available and any analysis must be based on the assumption that the team owners and players desire to maximize their profits. If this is true, "players will be distributed among teams so that they are put to their most 'productive' use; each will play

Legally, the restraint of trade argument was lost in *Flood* and was not directly considered in *Philadelphia World Hockey Club*; however, it appears to fit squarely within the holding of *United States v. Socony Vacuum Oil Co.*¹³² that all agreements to manipulate prices are conclusively unreasonable restraints of trade in violation of section 1 of the Sherman Act.¹³³

In their present form professional athletics—baseball and hockey—appear to violate the Sherman Act. If Congress wishes to merge the leagues and provide professional sports with an exemption, it will probably do so at the price of condoning the exploitation of labor.¹³⁴ If the demand for professional athletics is great enough to support two leagues in football, baseball, basketball, and hockey, and if the owners and players attempt to maximize their profits, then a free market should allocate players as effectively as a system whereby players are controlled by a reserve system. If the demand for those sports is not present, then a congressional exemption will help underwrite professional

for the team that is able to get the highest return from his services." The allocation of players may well be similar under both the reserve and free market systems, but under the latter system, the player avoids exploitation. Rottenberg, *The Baseball Players' Labor Market*, 64 J. POL. ECON. 242 (1956), reprinted in D. WATSON, *PRICE THEORY IN ACTION* 342 (1969).

¹³²310 U.S. 150 (1940). See also Note, *Monopoly in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576 (1953).

¹³³As Mr. Justice Douglas stated,

The elimination of so-called competitive evils is no legal justification If the so-called competitive abuse were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition. . . .

310 U.S. at 220-21.

The Sherman Act places all such schemes beyond the pale and protects . . . our economy against any degree of interference. Congress . . . has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed real or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination

Id.

¹³⁴It should be noted that not all players are exploited since they might not command more money in a free market.

sports by permitting clubs to reduce costs by exploiting labor. In a free market in which owners desire to maximize their profits and there is no restrictive reserve clause, a club which desires near equality among teams would not maximize its profits by buying superstars who will play very little. It is also probable that most professional athletes desire to play their sport rather than receive a high wage for sitting out and being unavailable to another club. A club indulging in this type of behavior would not be maximizing its profits and would experience players leaving in an effort to play the sport although for less money. One reason that makes it doubtful that one or several wealthy clubs could dominate player talent is the unparalleled growth of athletics on the amateur, elementary, and secondary school level, as well as in the colleges and universities in the United States. For the major league sports of baseball, football, basketball, and hockey, there is a ready supply of good players who will become increasingly better in a free market system; the AFL's progress is a good indication of this growth. Given the supply of players today, clubs will only price themselves into bankruptcy if they fail to maximize their profits.

V. CONCLUSION

The contract "jumping" that has occurred in professional athletics over the last eight years is due to the desire of athletes to sell their services to the highest bidder, in short, to have their wages determined by supply and demand. While this has been relatively easy for professional football and basketball players as a result of their more flexible option clauses, their brothers in professional baseball and hockey have been permanently tied to the clubs holding their contracts. Curt Flood failed in his challenge of baseball's reserve clause. More recently, professional hockey players have foregone the legal challenge and simply left the NHL for the higher wages of the WHA. When the NHL teams have sued for contract violations, the players have challenged the hockey option clause as restraining their ability to trade their services. Aside from the merits of the antitrust issue, the question whether they may challenge those contracts as violative of antitrust laws remains unanswered.

Certainly the right of a player to sue on his contract would seem apparent if player contracts are viewed as individual contracts for personal services. But even if they are regarded as col-

lective agreements, the player may well have a right to bring a suit attacking the contract if there is standing under another federal law notwithstanding the prohibitions of section 301 as viewed in *Maddox* and *Sipes*. Although the Supreme Court has not overruled these decisions, its most recent decisions in *Arguelles* and *Nemitz* indicate that when an employee has a legitimate cause of action, and he may attack the collective contract under another law, he will not be denied his opportunity to do so even in the face of more prohibitive case law which has closed the door to individual suits under section 301.

Under the present antitrust laws the reserve system would be violative of section 1 of the Sherman Act even in view of the anachronistic rationale of *Flood*. The view that the reserve systems do not present a restraint of trade is somewhat specious; at any rate, the matter of antitrust exemptions for professional sports is for Congress and not the judiciary to determine, and there is little reason to believe that equality among teams will only be achieved through the judicious and sympathetic functioning of Congress. Team equality could as easily be achieved through the free market and could be achieved without exploiting the player.

ROBERT W. McCLELLAND

RECENT DEVELOPMENTS

ELECTIONS—REAPPORTIONMENT—Section 5 of the Voting Rights Act of 1965, which requires prior approval by federal officials of changes in state voting laws, held applicable to reapportionment plans of state legislatures.—*Georgia v. United States*, 411 U.S. 526 (1973).

In a recent decision, *Georgia v. United States*,¹ the United States Supreme Court held that, in accordance with section 5 of the Voting Rights Act of 1965,² reapportionment plans must receive the approval of either the United States Attorney General or the United States District Court for the District of Columbia before they may be put into effect. In upholding a three-judge federal

¹411 U.S. 526 (1973).

²42 U.S.C. § 1973c (1970). The text of this section is as follows:

Whenever a state or political subdivision with respect to which the prohibitions set forth in section 1973b(a) based upon determinations made under the first sentence of section 1973(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State

district court injunction³ preventing elections under a reapportionment plan for the Georgia House of Representatives, Justice Stewart, writing for the majority, rejected Georgia's contentions that section 5 was inapplicable to reapportionment plans, that the Attorney General's objection had not been adequate, and that in regard to an earlier plan to which he had also objected, the Attorney General's objections had not been timely. Chief Justice Burger concurred in the result. Justice White, joined by Justices Powell and Rehnquist, dissented, contending that the Attorney General's objection had been inadequate under section 5, although he agreed with the majority that reapportionment plans were subject to section 5 preclearance. Justice Powell also filed a separate dissenting opinion, suggesting that he questioned the constitutionality of section 5 itself.

The events which led to the controversy began on October 14, 1971, following the 1970 decennial census, when the Georgia legislature reapportioned its State House of Representatives.⁴ The 1971

or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

A state or political subdivision is subject to section 5 if it qualifies under section 4(b) of the Act, 42 U.S.C. § 1973b(b) (1970). That section provides that the section of the Act which suspends the use of tests or devices as prerequisite to voting registration (section 4(a), 42 U.S.C. § 1973b(a)), applies to any state or political subdivision in which (1) the Attorney General determines that a test or device was in use on November 1, 1964, or November 1, 1968, and (2) the Director of the Census finds that less than fifty per cent of the voting age population was registered on November 1, 1964, or November 1, 1968, or less than fifty per cent of the eligible voters voted in either the 1964 or 1968 presidential elections. The coverage formula applies to both sections 4(a) and 5.

For a general discussion of section 5, see Roman, *Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 22 AM. U. L. REV. 111 (1972).

³United States v. Georgia, 351 F. Supp. 444 (N.D. Ga. 1972).

⁴The legislature also reapportioned the state senate and federal congressional districts; however, the only reapportionment challenged was that of the state house of representatives. 411 U.S. at 528.

reapportionment plan differed from a 1968 court-ordered plan⁵ principally as to a reduction in the total number of districts, an increase in the number of multi-member districts, and a change from a scheme in which House district boundaries coincided with county lines to one in which the district boundaries irregularly crossed those lines.⁶ Additionally, the boundaries of all but one district were changed and the number of representatives altered in many districts.⁷ Under both plans each candidate in a multi-member district had to designate the seat for which he was running⁸—the so-called “numbered post” requirement, and if no candidate received a majority of the votes cast for the position, a majority runoff election was required.⁹

Following enactment of the 1971 plan, it was forwarded for review to the United States Attorney General, pursuant to section 5. The plan was received by the Attorney General on November 15, 1971, and two weeks later the Justice Department requested that Georgia furnish the Attorney General with additional information relating to the reapportionment plan in order “to evaluate properly the changes . . . submitted.”¹⁰ The letter noted, in accordance with the regulations promulgated by the Attorney General,¹¹ that the

⁵*See Toombs v. Fortson*, 277 F. Supp. 821 (N.D. Ga. 1967).

⁶The 1971 plan had 105 districts, as compared to 118 provided by the 1968 plan, forty-nine multi-member districts, as compared to forty-seven, and the counties were unevenly divided, with small odd-shaped portions of one county included within districts composed mainly of territory within an adjacent county, whereas, the 1968 plan had followed county lines, with certain districts encompassing more than one county and certain counties including more than one district. Thirty-one of the forty-nine multi-member districts and twenty-one of the fifty-six single-member districts crossed county lines under the 1971 plan. Brief for NAACP et al. as Amici Curiae at 3-4, *Georgia v. United States*, 411 U.S. 526 (1973) [hereinafter cited as *Brief for Amici*].

⁷*Id.* at 4.

⁸GA. CODE ANN. § 34-1015 (1970). The Court cited this section; however, the author feels the proper section should have been section 47-119.

⁹GA. CODE ANN. § 34-1513 (Supp. 1972).

¹⁰Brief for Amici at 5. The Justice Department specifically requested census maps of the 1964 and 1968 house districts, the distribution of white and nonwhite population within the 1964, 1968, and 1971 districts, a history of the primary and general elections in which Black candidates ran, data, including race, with respect to all elected state representatives, and the legislative history of all redistricting bills. 411 U.S. at 529 n.4.

¹¹28 C.F.R. § 51.18(a) (1972), which states:

sixty-day period within which the Attorney General was required to make his objections to the plan would not commence until the additional information was received. This information was received by the Justice Department on January 6, 1972, and on March 3, 1972, the Attorney General formally objected to the Georgia plan.¹²

Six days later, on March 9, 1972, the Georgia legislature, responding to the Attorney General's objections, enacted a new reapportionment plan for its House. The 1972 plan provided for more districts and fewer multi-member districts, but continued the scheme of crossing county lines in drawing district boundaries.¹³ Of particular interest to the Justice Department was the demographic concentration of Black voters in fifteen multi-member districts. Combined with the multi-member districts, the numbered posts, and the majority runoff requirement, this demographic concentration caused the Justice Department to believe that there was a significant likelihood that the voting rights of Black voters would be diluted or abridged. Therefore, on March 24, 1972, the Attorney General objected to the March 9, 1972 plan.¹⁴

If the submission does not satisfy the requirements of § 51.10(a), the Attorney General shall request such further information as is necessary from the submitting authority and advise the submitting authority that the 60-day period will not commence until such information is received by the Department of Justice. The request shall be made as promptly as possible after receipt of the original inadequate submission.

¹²The Justice Department letter stated that because of the plan's "combination of multi-member districts, numbered posts, and a majority (runoff) requirement" together with "extensive splitting and regrouping of counties," the Attorney General was "unable to conclude that the plan does not have a discriminatory racial effect on voting." Brief for Amici at 6.

¹³*Id.* at 7.

¹⁴In pertinent part the letter stated:

After a careful analysis of the Act redistricting the Georgia House of Representatives, I must conclude that this reapportionment does not satisfactorily remove the features found objectionable in your prior submission, namely, the combination of multi-member districts, numbered posts, and a majority (runoff) requirement discussed in my March 3, 1972 letter to you interposing an objection to your earlier Section 5 submission. Accordingly, and for the reasons enunciated in my March 3, 1972 letter I must, on behalf of the Attorney General, object to S.B. 690 reapportioning the Georgia House of Representatives.

Upon the failure of the Georgia legislature to enact another redistricting plan, the Attorney General filed suit¹⁵ to enjoin elections under the 1972 plan. A three-judge court was convened which "enjoin[ed] the State of Georgia from proceeding to hold elections under the present reapportionment plan."¹⁶ The court did not pass on the plan's effect on the voting rights of Black voters, but held that in accordance with section 5 of the Voting Rights Act the Attorney General had jurisdiction over the plan, and that since he had not approved of it, it could not go into effect. The court further found section 5 "constitutional as applied."¹⁷ Georgia appealed the court's decision to the Supreme Court, which noted probable jurisdiction and stayed the enforcement of the district court injunction.¹⁸ Upon full consideration the Court upheld the lower court's injunction and remanded to the district court with the instructions that any future elections be enjoined until Georgia offered a plan to which the Attorney General registered no objection, or alternatively, until the 1972 plan was approved by the District Court for the District of Columbia in a declaratory judgment action.

The major question facing the Court in the instant case was that of the applicability of section 5 to reapportionment plans. In enacting the voting act of 1965, Congress had recognized that case-by-case litigation under previous civil right statutes had been ineffective in gaining voting rights for minorities.¹⁹ Congress was not convinced that the Act's suspension of liter-

¹⁵The Attorney General is empowered under section 12(d) of the Voting Rights Act, *as amended*, 42 U.S.C. § 1973j(d) (1970), to bring suit to prevent the implementation of changes which have not received prior approval.

¹⁶351 F. Supp. at 447.

¹⁷*Id.* at 446.

¹⁸409 U.S. 911 (1972). The effect of the stay of execution was to allow the November 1972 elections to proceed under the 1972 plan.

¹⁹Attorney General Katzenbach reported to the House committee considering the Act that often as many as 6,000 man-hours have been devoted to the analysis of voting records in cases brought under previous statutes. This was in addition to the time spent on trial preparation and the almost inevitable appeal. H.R. REP. No. 439, 89th Cong., 1st Sess. 9-10 (1965).

The committee noted in its report that in one instance involving Dallas County, Alabama, litigation had dragged on for four years, and yet even at the end of that period only 383 out of 15,000 potential Black voters had been registered in that county. *Id.* at 10-11.

acy tests and other discriminatorily-applied devices, along with the appointment of federal examiners to oversee voter registration and elections in covered jurisdictions, would, by themselves, assure access to the voting booth to minority voters. Skillful legislatures, determined to thwart the effect of judicial decisions²⁰ which had struck down discriminatory voting statutes, had enacted new laws with the same purposes as those found unconstitutional.²¹ There was nothing in the history of the voting rights struggle to suggest that such would not be the reaction of legislatures to the Voting Rights Act. Therefore, Congress included section 5, which required prior federal approval of any "voting qualifications or prerequisite to voting, or standard, practice, or procedure with respect to voting different than that in effect on November 1, 1964" enacted by a covered state or political subdivision.²²

In reaching its decision in the instant case, the Court reviewed a number of cases dealing with the Voting Rights Act in general and with section 5 in particular. The constitutionality of certain provisions of the Voting Rights Act, including section 5, was first

²⁰Among the statutes or constitutional provisions found unconstitutional were: the "Grandfather Clause" cases, *Guinn v. United States*, 238 U.S. 347 (1915); *Myers v. Anderson*, 238 U.S. 368 (1915); the "White Primary" cases, *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927); impermissibly short registration period, *Lane v. Wilson*, 307 U.S. 268 (1939); racial gerrymandering, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); and the discriminatory use of tests, *United States v. Mississippi*, 380 U.S. 128 (1965); *Louisiana v. United States*, 380 U.S. 145 (1965); *Schnell v. Davis*, 336 U.S. 933 (1949).

²¹For a discussion of the tactics used by the legislatures, see *United States v. Mississippi*, 229 F. Supp. 925, 995-97 (S.D. Miss. 1964) (Brown, J. dissenting), *rev'd*, 380 U.S. 128 (1965); *United States v. Louisiana*, 225 F. Supp. 353, 375-81 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965).

²²This prior approval requirement was similar to the "freezing" of voter qualifications or procedures used as a judicial remedy to prevent election officials from imposing new and burdensome voting requirements on Black voters, where white voters, who had registered before the changes were enacted, had benefited from loosely administered requirements. See *United States v. Duke*, 332 F.2d 759 (5th Cir. 1964). In freezing, courts ordered election officials to apply to Black registrants the actual standards previously applied for the benefit of white registrants. Freezing, however, had only been applied when discrimination in application of voting qualifications had been proved. See Note, *The Freezing Concept and Voter Qualifications*, 16 HASTINGS L.J. 440 (1965). Section 5, however, presumes that discrimination exists in all jurisdictions covered by the Act. 116 CONG. REC. 5519 (1970).

challenged in *South Carolina v. Katzenbach*.²³ In upholding the constitutionality of all the challenged sections,²⁴ Chief Justice Warren observed that suspension of new voting regulations under section 5 may have been "an uncommon exercise of congressional power" but concluded that "exceptional conditions can justify legislative measures not otherwise appropriate."²⁵

The Court was first presented with an important case concerning the Act's substantive provisions in *Allen v. State Board of Elections*,²⁶ a case involving the scope of section 5's application

²³383 U.S. 301 (1966). South Carolina sought a declaratory judgment that selected portions of the Act were unconstitutional and an injunction against the enforcement of these provisions.

²⁴The Court held that the basic test to be applied to legislation enacted under section 2 of the fifteenth amendment was the same as that laid down by Chief Justice Marshall fifty years before the amendment had been enacted, when he stated:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Id. at 326, citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819).

The Court pointed out that the same sentiment had been echoed in other cases dealing with the enforcement clauses of other amendments: *James Everard's Breweries v. Day*, 265 U.S. 545 (1924) (approving legislation under section 2 of the eighteenth amendment); *Ex parte Virginia*, 100 U.S. 339 (1879) (upholding legislation enacted under the Civil War amendments).

²⁵383 U.S. at 334. Justice Black found section 5 inconsistent with the federal-state balance of power:

Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them. . . . [T]he inevitable effect of any such law . . . create[s] the impression that the State or States treated in this way are little more than conquered provinces.

Id. at 359-60 (Black, J., concurring in part and dissenting in part). For a discussion in support of the view that the Voting Rights Act and particularly section 5 are unconstitutional, see Rice, *The Voting Rights Act of 1965: Some Dissenting Observations*, 15 U. KAN. L. REV. 159 (1966). But see Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1 (1965); Cox, *Constitutionality of the Voting Rights Act of 1965*, 3 HOUSTON L. REV. 1 (1965).

²⁶393 U.S. 544 (1969). Consolidated on appeal with *Allen*, which involved a Virginia statute requiring handwritten write-in votes and a State Board of

to changes in voting regulations. In defining that scope, the Court gave a broad interpretation to the words of the statute requiring prior approval of a change in "any . . . standard, practice, or procedure with respect to voting." It held that "[t]he legislative history [of the Act] on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered state in even a *minor* way."²⁷

In *Perkins v. Matthews*²⁸ the Court maintained its broad view of section 5's scope and held that it applied to (1) a relocation of polling places, (2) changes in municipal boundaries which enlarged the voting population, thereby diluting the voting power of Black voters, and (3) a change from ward to at-large election of city aldermen. In his separate opinion in *Allen*, Justice Harlan had disapproved of the Court's holding that section 5 had been intended by Congress to cover changes in voting laws which would dilute the voting strength of Black voters.²⁹ In *Perkins* the Court acknowledged that that had indeed been its interpretation of the section and reaffirmed its earlier opinion.³⁰

With this background *Georgia* reached the Supreme Court. Justice Stewart found little difficulty in disposing of Georgia's contention that section 5 was inapplicable because the multi-member districts, numbered posts, and the majority runoff features of the 1972 plan did not differ from procedures in effect prior to November 1, 1964, and, hence, did not constitute changes within the meaning of section 5. In rejecting that contention, Justice Stewart observed, "[s]ection 5 is not concerned with a simple inventory of voting procedures, but rather with the reality of

Elections bulletin directing election judges to aid illiterates in marking ballots, were three Mississippi cases: *Fairley v. Patterson*, 282 F. Supp. 164 (S.D. Miss. 1967) (change from district to at-large elections of county supervisors); *Bunton v. Patterson*, 281 F. Supp. 918 (S.D. Miss. 1967) (change from election to appointment of county superintendents of education in certain counties); and *Whitley v. Williams*, 296 F. Supp. 754 (S.D. Miss. 1967) (increase in requirements for independent candidates in general elections).

²⁷*Id.* at 566 (emphasis added).

²⁸400 U.S. 379 (1971).

²⁹393 U.S. at 582 (Harlan, J., concurring in part and dissenting in part).

³⁰400 U.S. at 390.

changed practices as they affect Negro voters.”³¹ Therefore, although such features had existed in legislative election statutes prior to November 1, 1964, it was clear that the “extensive reorganization” of the House districts constituted “substantial departures from the electoral state of things under previous law.”³²

The real question facing the Court was Georgia’s second contention that section 5 did not reach legislative reapportionment plans. In concluding that that section did apply to such plans, the Court reviewed its earlier decisions on section 5 and found within them ample authority for its opinion. In particular the Court reviewed its holding in *Fairley v. Patterson*,³³ one of the companion cases to *Allen*, in which it had occasion to consider the applicability of section 5 to a change from district to at-large elections. It had been the Court’s opinion that that change had the potential of diluting the voting power of Black voters and would thereby be subject to section 5 preclearance, since in the words of the Court, “[t]he right to vote can be affected by a dilution in voting power as well as by an absolute prohibition on casting a ballot.”³⁴ It appeared to the Court that the Georgia plan might well have the same effect on the voting rights of Black voters in that state.

It is important to note that in the posture that the instant case reached the Court, a decision as to the *actual* discriminatory purpose or effect of the Georgia House plan was not required. Rather, it was necessary only to find a *potential* for an abridgement of Black voters’ rights to invoke section 5 coverage. Earlier decisions of the Court had recognized that multi-member districts might “operate to minimize or cancel out the voting strength of racial or political elements of the voting population.”³⁵ The Court in *Georgia* obviously detected a purpose on the part of the Georgia legislature to dilute the voting power of Black voters by this plan, but it was not necessary to its decision as to section 5 coverage to

³¹411 U.S. at 531.

³²*Id.*

³³393 U.S. 544 (1969).

³⁴*Id.* at 569, *citing* Reynolds v. Sims, 377 U.S. 533, 555 (1964).

³⁵Fortson v. Dorsey, 379 U.S. 433, 439 (1965). The Court has never, however, held multi-member districts illegal per se under the equal protection clause of the fourteenth amendment. See Whitcomb v. Chavis, 403 U.S. 124, 141-44 (1971); Kilgarlin v. Hill, 386 U.S. 120 (1967); Burns v. Richardson,

so find. That question may be the subject of future litigation should Georgia seek a declaratory judgment on the plan.³⁶

The Court also pointed out that its opinion on section 5 coverage of reapportionment plans was also supported by congressional action in 1970, when Congress extended the operation of section 5 for five more years.³⁷ Any doubt that Congress in originally enacting the Voting Rights Act in 1965 did not intend that section 5 cover changes in voting laws that might dilute voting strength was removed by the extensive attention that the subject received in the deliberations on the 1970 amendments to the Act.³⁸ Both in committee hearings and in debates on the floors of both houses, the Court's interpretation of section 5 in *Allen* was widely recognized and the subject of considerable debate.³⁹ As Justice Stewart noted, "[h]ad Congress disagreed with the interpretation of § 5 in *Allen*, it had ample opportunity to amend the statute."⁴⁰

384 U.S. 73 (1966). *See also* *Harrison v. Schaefer*, 383 U.S. 269 (1966); *Burnette v. Davis*, 382 U.S. 42 (1965); *Lucas v. Colorado General Assembly*, 377 U.S. 713 (1964).

³⁶Section 5 allows the state to seek a declaratory judgment from the United States District Court for the District of Columbia that the change in voting regulations does not have a discriminatory purpose or effect. This procedure is an alternative to obtaining clearance from the Attorney General.

³⁷As originally enacted, section 5 was scheduled to expire on August 6, 1970. Congress, however, in the Voting Rights Act Amendments of 1970, 42 U.S.C. § 1973c (1970), extended the provisions of section 5 for five more years without any substantial modification of that section.

³⁸*See, e.g.*, 115 CONG. REC. 38486, 38488, 38489, 38495 (1969); 116 CONG. REC. 5535, 7105 (1970).

³⁹*See, e.g., Hearings on Amendments to the Voting Rights Act of 1965 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st & 2d Sess. 48, 52, 168-69, 196, 369-70, 398, 426-27, 469, 505, 522 (1970); *Hearings on Voting Rights Act Extension Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 1st Sess., ser. 3, at 1, 4, 18, 83, 130-31, 147-49, 155, 172, 182-83, 267, 271, 313 (1970). *See also* 116 CONG. REC. 5538, 5546, 6348, 7710-11 (1970) (Senate debates).

⁴⁰411 U.S. at 533. *See* *Shapiro v. United States*, 335 U.S. 1, 16 (1948); *Hecht v. Malley*, 265 U.S. 144, 153 (1924) (when a judicial construction has been given a statute, the reenactment of that statute is generally held to be a legislative adoption of that construction). *Cf.* *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 544-45 (1954); *Missouri v. Ross*, 299 U.S. 72, 75 (1936); *Dollar Savings Bank v. United States*, 86 U.S. (19 Wall.) 227, 237 (1873).

Finally, as further support of its decision the Court was able to point to Georgia's own action as indicative of its belief that section 5 covered legislative reapportionment plans. The Georgia Attorney General had stated in his letter accompanying the 1971 plan that it was being submitted in accordance with section 5 requirements.⁴¹ The Court also noted that as of December 1, 1972, 381 post-*Allen* reapportionment plans had been submitted to the Attorney General for approval pursuant to section 5.

The second major issue presented to the Court in this case concerned the objections of the Attorney General to the plan under section 5. Pursuant to his administration of the Voting Rights Act, the Attorney General had promulgated regulations⁴² regarding the submission of changes in voting laws for his approval. Georgia contended that these regulations had been issued without congressional authority. The Court held that, although the Voting Rights Act itself did not grant the Attorney General such authority, it was within his authority under 5 U.S.C. section 301⁴³ to issue such regulations.

With this issue aside the Court considered Georgia's claim that the Justice Department objection to the 1971 plan had not been timely, since it came more than sixty days after the plan had been submitted.⁴⁴ While the Court indicated the question as to the 1971 plan was probably moot in light of the repeal of that plan following the Justice Department's objection, it went on to hold that the objections to the first plan had been timely. The Court noted that the objection had been made within sixty days following submis-

⁴¹The letter of the Georgia Attorney General accompanying the 1971 submission stated that it was "made pursuant to § 5," and he explained that the 1968 plan had not been submitted "because at that time prior to *Allen v. State Board of Elections*, . . . it was believed to be unnecessary to submit reapportionment plans to the United States Attorney General pursuant to the Voting Rights Act of 1965." 411 U.S. at 533-34.

It should be noted, however, that the Court in *Connor v. Johnson*, 402 U.S. 690 (1971), held that court-ordered reapportionment plans were not subject to the preclearance requirements of section 5. For a discussion critical of the Court's decision in that case, see Roman, *Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 22 AM. U.L. REV. 111, 122-24 (1972).

⁴²28 C.F.R. §§ 51.5-26 (1972).

⁴³Section 301 provides in pertinent part: "The head of an Executive department . . . may prescribe regulations for the government of his department, the conduct of its employees, and the . . . performance of its business" (emphasis added).

⁴⁴See note 11 *supra* & accompanying text.

sion of the additional material requested by the Justice Department, and that its postponement of the commencement of the period until the material had been received had been in accord with the regulations.⁴⁵

In answer to Georgia's further claim that the Attorney General's objections had been equivocal in that he did not state that he found the purpose or effect of the plans to be one which would "deny or abridge the right to vote on the basis of race or color," but rather that he was "unable to determine" that such would not be the effect,⁴⁶ the Court held that the burden of proof of the non-discriminatory purpose or effect of the changes was properly on the submitting party. Thus, since Georgia had not met this burden, the Attorney General had been correct in not approving the plan. In reaching this conclusion the Court noted that if Georgia had chosen to submit the plan to the District Court for the District of Columbia for a declaratory judgment, it would have carried the burden of proof there. To allow a lesser burden of proof in submission to the Attorney General would be incongruous in the Court's opinion.⁴⁷

It was on this point that the dissenters took issue with the majority opinion. Justice White believed that the Attorney General should either have registered a clear objection to the plan or allowed it to go into effect. To him, the extraordinary nature of a requirement that a state must receive prior federal approval of certain of its laws, combined with the burden of proof the state bore in its quest for such approval, required that the Attorney General give the submitting party either an unequivocal objection or approval, not something in between. In Justice White's opinion, the Attorney General could not object by "simply saying that he cannot make up his mind or that the evidence is in equipoise."⁴⁸

The Court's decision not to invalidate the elections held under the 1972 plan was in keeping with its past reluctance to order new

⁴⁵See note 11 *supra*.

⁴⁶See note 12 *supra* & accompanying text.

⁴⁷As the Court properly recognized, the very purpose of section 5 was to shift the burden of proving the discriminatory effects of election laws from parties affected by the changes in the laws to the covered jurisdictions to prove the nondiscriminatory effects of the changes. 411 U.S. at 538 n.9. See H.R. REP. NO. 439, 89th Cong., 1st Sess. 9-11 (1965). See also H.R. REP. NO. 397, 91st Cong., 1st Sess. 8 (1969); 116 CONG. REC. 5517, 5521 (1970) ("Joint Views of Ten Members of the [Senate] Judiciary Committee").

⁴⁸411 U.S. at 545.

elections in other section 5 cases where elections had been conducted subject to unapproved changes.⁴⁹ The Court also felt it would be inequitable to order new elections in this case in view of the fact that its stay of execution of the lower court's injunction had allowed elections to proceed under the unapproved 1972 plan.

While the Court's decision in this case was not surprising or unexpected, particularly in view of its decisions in earlier section 5 cases, its importance should not be disparaged. Since the Voting Rights Act went into effect, state legislatures in those states covered by the Act have been forced to use more subtle means than those used previously to deny Black citizens an effective voice in the selection of their elected officials. While no longer able to deny them the right to vote absolutely by discriminatory literacy tests or even outright intimidation, these legislatures remained determined to at least dilute their voting strength. Such was obviously the intent of the Georgia legislature in enacting these reapportionment plans. But as the Court pointed out in *Allen*, and which appears to be its rationale in *Georgia*, "[t]he Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race."⁵⁰ So long as the Court maintains this view of the Act, and more importantly so long as the Justice Department remains sensitive to such attempts, section 5 will remain an effective tool to ensure that the recently acquired voting rights of Black citizens in those states are protected.

⁴⁹In *Allen* the Court denied the request of the Mississippi appellants to set aside the elections on the basis that:

These § 5 coverage questions involve complex issues of first impression—issues subject to rational disagreement. The state enactments were not so clearly subject to § 5 that the appellees' failure to submit them for approval constituted deliberate defiance of the Act.

393 U.S. at 572.

In *Perkins* the appellant also urged that the elections be set aside. The Court acknowledged that the disputed elections had been held two months after the *Allen* decision, and, hence, the question of the scope of section 5 could no longer be deemed one of first impression. Nevertheless, it declined to set aside the elections and found that "in determining the appropriate remedy, other factors may be relevant, such as the nature of the changes complained of, and whether it was reasonably clear at the time of the elections that the changes were covered by § 5." 400 U.S. at 396.

⁵⁰393 U.S. at 565.

CRIMINAL PROCEDURE—SEARCH AND SEIZURES—Fourth amendment held not to require that one giving permission for a consent search be informed that he has the right to withhold his consent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

Respondent, Robert Bustamonte, was arrested after police officers searched the car in which he was riding and found three checks,¹ previously stolen from a car wash.² The search took place after Police Officer Rand stopped respondent's automobile because one headlight and a license plate light were burned out. Joe Alcala and the respondent were in the front seat with Joe Gonzales, the driver. There were also three other men in the rear seat. Of the six, only Alcala could produce a driver's license. Alcala explained that the car belonged to his brother. After two additional policemen had arrived, Officer Rand asked Alcala's permission to search the car, to which Alcala replied, "Sure, go ahead."³ Until this time, the officers had threatened no one with arrest.⁴ The search then revealed the three stolen checks.

At trial, respondent moved to suppress the introduction of this evidence on the ground that the material had been acquired by the use of an unconstitutional search and seizure.⁵ The trial judge denied the motion to suppress the evidence obtained in the search, and respondent was convicted in the Superior Court of the County of Santa Clara on a charge of possessing a check with intent

¹The checks were found wadded up under the left rear seat of the automobile. *Schneckloth v. Bustamonte*, 412 U.S. 218, 220 (1973).

²A check writing machine and several blank checks had been stolen from the office of the car wash. *People v. Bustamonte*, 270 Cal. App. 2d 648, 76 Cal. Rptr. 17 (1969).

³412 U.S. at 220.

⁴In fact, according to Officer Rand's uncontradicted testimony, it "was all very congenial at this time." *Id.*

⁵Any search conducted without a warrant issued upon probable cause is unreasonable. *Katz v. United States*, 389 U.S. 347, 357 (1967). There are, however, some exceptions to this general rule, one of which is a search conducted after obtaining a valid consent to search from the suspect. *Davis v. United States*, 328 U.S. 582, 593 (1946); *Zap v. United States*, 328 U.S. 624, 630 (1946). Since there was no warrant involved in the instant case, the search was constitutionally invalid without Alcala's consent. The other men in Alcala's car also had standing to assert Alcala's constitutional right to be free from a warrantless search. *Jones v. United States*, 362 U.S. 257 (1960). Compare *Cotton v. United States*, 371 F.2d 385 (9th Cir. 1967), with *Diaz-Rosendo v. United States*, 357 F.2d 124 (9th Cir. 1966) (en banc).

to defraud.⁶ The California Court of Appeals affirmed respondent's conviction.⁷ The California Supreme Court denied review.⁸ The respondent then sought a writ of habeas corpus, which was denied by the United States District Court for the Northern District of California.⁹ On appeal, the Court of Appeals for the Ninth Circuit set aside the district court's order.¹⁰ The appellate court reasoned that consenting to a search was a waiver of respondent's fourth and fourteenth amendment rights. On this basis, the court ruled that the State must show that consent had been given with an understanding that it could be effectively withheld.¹¹

The United States Supreme Court, in *Schneckloth v. Bustamonte*,¹² then granted the State's petition for certiorari, and reversed the court of appeals. Justice Stewart wrote the opinion of the Court, to which Justices Douglas, Brennan, and Marshall separately dissented.¹³ The Court ruled that when the subject of a consent search is not in custody, and the State attempts to justify a search on the basis of his consent, the State must show that the consent was voluntarily given. Voluntariness, in this situation, is a question of fact to be determined from all of the circumstances surrounding the consent. While the subject's knowledge of his right to refuse to consent is a factor to be taken into consideration, the prosecution is not required to demonstrate the subject's knowl-

⁶CAL. PENAL CODE § 475(a) (1967), which involves possession of a completed check with intent to defraud.

⁷*People v. Bustamonte*, 270 Cal. App. 2d 648, 76 Cal. Rptr. 17 (1969).

⁸412 U.S. at 221 n.2.

⁹*Id.* at 221 n.3.

¹⁰*Bustamonte v. Schneckloth*, 448 F.2d 699 (9th Cir. 1971).

¹¹*Id.* at 700. The court further held that consent could not be found solely from the absence of coercion and a verbal expression of consent.

¹²412 U.S. 218 (1973).

¹³The Court was also asked to overrule its prior decision in *Kaufman v. United States*, 394 U.S. 217 (1969), which allowed a state or federal prisoner to collaterally attack his conviction when the exclusionary rule had been violated. 412 U.S. at 249 n.38. The majority found no valid fourth or fourteenth amendment claim and, therefore, did not rule on that point. *Id.* However, Justice Powell, with whom Chief Justice Burger and Justice Rehnquist joined, addressed this question in his concurring opinion. *Id.* at 250 (Powell, J., concurring). Justice Powell summarized his opinion by stating:

I would hold that federal collateral review of a state prisoner's Fourth Amendment claims—claims which rarely bear on innocence—should be confined solely to the question of whether the petitioner was pro-

edge of his right to refuse to consent as a prerequisite to establishing a voluntary consent.¹⁴

The Court, in deciding the question of what the State must prove to demonstrate that a consent was "voluntarily" given, adopted the standard applied by the state courts of California. That standard, as expressed by Justice Traynor of the Supreme Court of California, stated that whether an apparent consent was given voluntarily or in submission to an express or implied assertion of authority is a question of fact to be determined from all of the circumstances of the particular case.¹⁵

In determining whether a confession is voluntary, the Court reasoned that two competing concerns were present. First, the reviewing court must have assurances that the consent was given in the absence of coercion. Second, the court must consider the

vided a fair opportunity to raise and have adjudicated the question in state courts.

Id. Also in agreement with Justice Powell was Justice Blackmun, but he felt it was not necessary to overrule *Kaufman* to decide the present case. *Id.* at 249 (Blackmun, J., concurring). Justice Stewart, who wrote the majority opinion in the present case, joined with Justice Harlan in his dissent in *Kaufman v. United States*, 394 U.S. 217, 242 (1969) (Harlan, J., dissenting). Justice Marshall, who dissented in the instant case, did not take part in the consideration or decision of *Kaufman*. *Id.* at 231.

¹⁴Specifically, the *Bustamonte* Court held:

We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

412 U.S. at 248.

¹⁵*Id.* at 230. Justice Traynor stated this view in *People v. Michael*, 45 Cal. 2d 751, 753, 290 P.2d 852, 854 (1955). Defendant was prosecuted for violations of the narcotics laws. The narcotics were found in defendant's possession after defendant's mother had consented to a search of the house. The defendant contended that the admission of the officers into her house, and the production of the narcotics, were in submission to authority and without effective consent. *See, e.g.*, *People v. Tremayne*, 20 Cal. App. 3d 1006, 98 Cal. Rptr. 193 (1971); *People v. Roberts*, 246 Cal. App. 2d 715, 55 Cal. Rptr. 62 (1966); *cf. People v. MacIntosh*, 264 Cal. App. 2d 701, 70 Cal. Rptr. 667 (1968). *But see Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

need of the police for consent searches.¹⁶ The Supreme Court stated that these two concerns could be best served, in the area of consent searches, by applying the standard of voluntariness as developed in those cases dealing with the voluntariness of a defendant's confession for purposes of the fourteenth amendment.¹⁷ By using this standard, the Court would look to all of the surrounding circumstances, as opposed to one specific criterion.¹⁸ Thus, the defendant's knowledge of his right to refuse consent is only one factor among many to be considered. In this way, "searches that are the product of police coercion can . . . be filtered out without undermining the continuing validity of consent searches."¹⁹

The requirement of the Court that consent to a warrantless search must be given voluntarily cannot be criticized. However, respondent argued that in addition to the consent being voluntarily given, it should also be given with knowledge that it can be effectively withheld. The *Bustamonte* Court declined to hold that consent must be knowledgeable.²⁰ Instead, the Court reduced knowledge to a single factor to be considered in determining voluntariness.²¹ It is questionable that consent to a warrantless search could truly be called voluntary if, in fact, the suspect did not know he could effectively refuse.²²

¹⁶412 U.S. at 227.

¹⁷The Court stated that the most accurate meaning of voluntariness was developed in those cases dealing with coerced confessions. The Court further stated that it would look to that body of case law to initially determine the meaning of voluntariness in the context of consent searches. *Id.* at 223.

¹⁸The Court discussed some of the factors used to determine voluntariness for purposes of the fourteenth amendment: *Davis v. North Carolina*, 384 U.S. 737 (1966) (the length of the detention); *Payne v. Arkansas*, 356 U.S. 560 (1958) (the low intelligence of the accused); *Fikes v. Alabama*, 352 U.S. 191 (1957) (the lack of any advice to the accused of his constitutional rights); *Haley v. Ohio*, 332 U.S. 596 (1948) (the youth of the accused); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (the use of physical punishment such as the deprivation of food or sleep); *Chambers v. Florida*, 309 U.S. 227 (1940) (the repeated and prolonged nature of the questioning). *See also* 412 U.S. at 226. Presumably the Court intended to use many, if not all, of these factors in determining the voluntariness of a consent search.

¹⁹412 U.S. at 229.

²⁰*Id.* at 227.

²¹*See* note 18 *supra*.

²²412 U.S. at 284 (Marshall, J., dissenting).

In *Miranda v. Arizona*,²³ the Supreme Court set forth the requirement that police, before interrogation is initiated, inform an in-custody suspect of his rights. This, of course, requires that the suspect speak both voluntarily and with knowledge that he could effectively refuse to speak. However, in the instant case, the Court felt that the situation in which a consent search normally arises was dissimilar to the custodial interrogation situation, discussed in *Miranda*,²⁴ and that, therefore, no warning should be required.²⁵

In *Miranda*, the Court found that custodial interrogations usually take place in an "inherently coercive situation,"²⁶ while the *Bustamonte* Court found that consent searches are most likely to occur in places familiar to the suspect, and under less formal and less structured circumstances.²⁷ The fact that consent searches usually take place in such surroundings does not necessarily exclude an "inherently coercive situation." From the point of view of the suspect, it is somewhat difficult to see which situation is more potentially coercive, being held at a stationhouse, or being stopped on the highway by a police car.²⁸ Both situations might be described as "inherently coercive." Therefore, under the *Miranda* standard, the suspect should be protected by a warning before he is asked to submit to a consent search. This warning would assure that anything the suspect did or said would be both voluntary and knowledgeable. The need for a warning seems apparent. For example, in the view of the court of appeals, as restated by Justice Marshall, "under many circumstances a reasonable person

²³384 U.S. 436 (1966). See generally Warden, *Miranda—Some History, Some Observations, and Some Questions*, 20 VAND. L. REV. 39 (1966).

²⁴384 U.S. 436 (1966).

²⁵412 U.S. at 247.

²⁶*Id.*

²⁷The Court stated:

In this case there is no evidence of any inherently coercive tactics—either from the nature of the police questioning or the environment in which it took place. Indeed, since consent searches will normally occur on a person's own familiar territory, the spectre of incommunicado police interrogation in some remote station house is simply inapposite.

Id.

²⁸The respondent was stopped at 2:40 a.m. by Officer Rand. Officer Rand did not ask to search Alcalá's car until two other policemen had arrived on the scene. *Id.* at 220.

might read an officer's 'May I' as the courteous expression of a demand backed by force of law."²⁹

The Court also was concerned that requiring the defendant to have knowledge of his right to refuse to consent would decrease the effectiveness of law enforcement officials.³⁰ This situation could arise if a defendant, who was the subject of the search, failed or refused to testify that he had known he could refuse to consent.³¹ Moreover, the Court seemed to fear even more the increased burden of proof placed on the prosecution.³² This fear, that a guilty defendant could be set free because of an illegally conducted consent search, might be alleviated, to some extent, if a suspect were advised of his right to refuse to be subjected to a consent search. However, the Court stated that advising the defendant of this right would interfere with police investigatory techniques. The Court explained that "it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning."³³ The Court's concern appears to be unfounded, especially in light of the fact that the Federal Bureau of Investigation has for several years given a warning before obtaining consent to search.³⁴ It would thus seem that the requirement of a warning is not too great a burden for the local police to bear.³⁵

²⁹*Id.* at 289. (Marshall, J., dissenting).

³⁰*Id.* at 231.

³¹*Id.* at 230.

³²From the following, it appears evident that the prosecution's burden of proof is the Court's chief concern:

The very object of the inquiry—the nature of a person's subjective understanding—underlines the difficulty of the prosecution's burden under the rule applied by the Court of Appeals in this case.

Id. However, with a warning appearing as evidence, the burden of proof would conceivably shift to the defendant to prove that his consent was not knowledgeable.

³³*Id.* at 231. The Court also cited numerous federal and state cases supporting its position. *Id.* at 231 nn.13, 14.

³⁴Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130, 143 (1967) (referring to a letter from J. Edgar Hoover on file in the Columbia Law Library).

³⁵Several federal courts and commentators have either required or suggested that law enforcement officials warn a suspect of his fourth amendment rights. See *United States v. Miller*, 395 F.2d 116 (7th Cir.), *cert. denied*, 393 U.S. 846 (1968) (defendant had freely, voluntarily and intelligently consented to a search and seizure); *United States v. Nikrasch*, 367 F.2d 740 (7th Cir.

The Ninth Circuit Court of Appeals based its opinion on the theory that consenting to a search was a waiver of a person's fourth amendment rights.³⁶ The standard for an effective waiver of a constitutional right was set forth in *Johnson v. Zerbst*,³⁷ in which the United States Supreme Court held that a waiver requires "an intentional relinquishment or abandonment of a known right or privilege."³⁸ The court of appeals, in the case at bar, relied on several federal court decisions after *Johnson* which held that a valid consent to a warrantless search constitutes a waiver of fourth amendment rights.³⁹ In *Bustamonte*, however, the Supreme Court

1966) (because the in-custody defendant had not been appraised of his fourth amendment rights, the defendant did not effectively consent to a warrantless search of his car); *United States v. Moderacki*, 280 F. Supp. 633 (D. Del. 1968) (the subject of the search must be warned that he need not submit to the search). See generally Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130 (1967); Note, *Consent Search: Waiver of Fourth Amendment Rights*, 12 ST. LOUIS U.L.J. 297 (1968); Note, *Effective Consent To Search and Seizure*, 113 U. PA. L. REV. 260 (1964). But see *Leeper v. United States*, 446 F.2d 281 (10th Cir. 1971), cert. denied, 404 U.S. 1021 (1972); *United States ex rel. Cole v. Mancusi*, 429 F.2d 61 (2d Cir. 1970), cert. denied, 401 U.S. 957 (1971); *United States ex rel. Harris v. Hendricks*, 423 F.2d 1096 (3d Cir. 1970); *United States v. Vickers*, 387 F.2d 703 (4th Cir. 1967), cert. denied, 392 U.S. 912 (1968).

³⁶As the court stated,

Any consent to the search, then, amounted to a waiver of a constitutional right and, to be effective, must meet the established standards for a constitutional waiver.

448 F.2d at 700.

³⁷304 U.S. 458 (1938).

³⁸*Id.* at 464.

³⁹See, e.g., *Schoepflin v. United States*, 391 F.2d 390 (9th Cir. 1968) (the words used by a suspect must show an understanding, uncoerced, and unequivocal election to grant the officers a license, which the suspect knew could be freely and effectively withheld, before a consent search will be deemed valid); *Cipres v. United States*, 343 F.2d 95 (9th Cir. 1965) (waiver, for the purpose of a consent search, means the intentional relinquishment of a known right or privilege).

There are several other federal court decisions not cited by the court of appeals which refer to a consent to a warrantless search as a waiver of fourth amendment rights. These cases also state that the consent must be knowingly and intelligently made. *United States v. Curiale*, 414 F.2d 744, 746 (2d Cir.), cert. denied, 396 U.S. 959 (1969); *Pendleton v. Nelson*, 404 F.2d 1074, 1076 (9th Cir. 1968); *Rosenthal v. Henderson*, 389 F.2d 514, 515 (6th Cir. 1968); *Wren v. United States*, 352 F.2d 617, 618 (10th Cir. 1965), cert. denied, 384 U.S. 944 (1966); *Simmons v. Bomar*, 349 F.2d 365, 366 (6th Cir. 1965); *United States v. Smith*, 308 F.2d 657, 663 (2d Cir. 1962), cert. denied, 372 U.S. 906 (1963); *Judd v. United States*, 190 F.2d 649, 650 (D.C. Cir. 1951);

said that the standard of a knowing waiver, as stated in *Johnson*, was to protect sixth amendment rights of a fair trial, not fourth amendment rights.⁴⁰ The Court further stated that there was a great difference between those rights that protect a fair trial and those that protect against unreasonable searches and seizures.⁴¹ The Court concluded that there was nothing in the purposes or application of the waiver requirements of *Johnson* that compels the equation of a knowing waiver with a consent search. The Court further held that by requiring such a waiver it would be ignoring the substance of the differing constitutional guarantees.⁴²

In *Bustamonte*, the Court has thus limited the required use of a knowing waiver to only those rights that protect the truth finding process and not those that protect personal liberties.⁴³ The curious result reached by the Court's *Bustamonte* decision is that a suspect can "consent" to a search without realizing that he had a right to withhold his consent. As Justice Marshall pointed out in his dissent, it is hard to visualize how a suspect's consent

United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966); cf. Zap v. United States, 328 U.S. 624 (1946).

⁴⁰But see *Johnson v. United States*, 333 U.S. 10 (1948), wherein the Supreme Court said that the consent to the search, "was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right." *Id.* at 13. It seems that in *Johnson* the Court was applying the standard of a knowing waiver to fourth amendment rights. In the instant case, however, the Court stated of the decision in *Johnson*:

[W]hile the Court spoke in terms of 'waiver' it arrived at the conclusion that there had been no 'waiver' from an analysis of the totality of the objective circumstances—not from the absence of any express indication of Johnson's knowledge of a right to refuse or the lack of explicit warnings.

412 U.S. at 243 n.31.

⁴¹412 U.S. at 242.

⁴²*Id.* at 246.

⁴³*Id.* at 237. The Court stated:

Almost without exception the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial.

Id. The one exception the Court mentioned was *Marchetti v. United States*, 390 U.S. 39 (1968), in which the Court found no waiver of the right against compulsory self-incrimination when a gambler was forced to pay a wagering tax. The *Bustamonte* Court added that the decision was based on the lack of a "voluntary" waiver rather than the lack of any "knowing and intelligent waiver." 412 U.S. at 237 n.18.

could be considered an uncoerced choice when he did not know of his right to refuse.⁴⁴

The *Bustamonte* Court held that, for purposes of the fourth and fourteenth amendments, the State must prove that the consent to a consent search was voluntarily given.⁴⁵ In order to prove voluntariness, the Court has adopted a complicated and subjective test that involves many different factors.⁴⁶ That which would seem to be the most important factor, the suspect's knowledge of his right to withhold his consent, is thus only one factor among many to be considered in a particular case.⁴⁷

The Court could have easily solved this apparent inequity by requiring the police to inform a suspect of his fourth amendment rights before obtaining his consent to search.⁴⁸ This requirement would assure a knowing and intelligent waiver of a suspect's fourth amendment rights in all cases. The *Bustamonte* Court declined to require such a warning. Perhaps the Court justifiably feared restricting the police in their investigatory activities.⁴⁹ But, whatever the underlying reasons, Justice Marshall's forewarning in his dissent seems to ring true. Justice Marshall aptly stated that the Court's holding confines the protection of the fourth amendment, in the context of consent searches, "to the sophisticated, the knowledgeable, and I might add, the few."⁵⁰

⁴⁴*Id.* at 277 (Marshall, J., dissenting).

⁴⁵See note 14 *supra*.

⁴⁶See note 18 *supra*.

⁴⁷412 U.S. at 277.

⁴⁸See note 35 *supra*. The warning might include explanation to the suspect of the following elements: that he has a right to refuse the search, that his refusal will be effective, that only one item was being sought and any other items found could not be used against him, and that he could effectively retract his consent at any time. The warning could be delivered orally by the policeman or printed on a form to be signed by the suspect upon his consent. This method, however, could present problems in those areas where the rate of illiteracy is high. See also *Fredricksen v. United States*, 266 F.2d 463 (D.C. Cir. 1959).

⁴⁹See note 33 *supra* & accompanying text.

⁵⁰412 U.S. at 289 (Marshall, J., dissenting).

CRIMINAL PROCEDURE—DUE PROCESS—Due process clause held applicable to the revocation of statutory good time credits and punitive segregation in interprison administrative actions.—*United States ex rel. Miller v. Twomey*, 479 F.2d 701 (7th Cir. 1973).

On May 16, 1973, the United States Court of Appeals of the Seventh Circuit consolidated six cases on appeal and decided them in *United States ex rel. Miller v. Twomey*.¹ All the actions concerned internal administration of state prisons and were brought by prisoners who alleged violations of federal rights protected by the Civil Rights Act of 1871.² Because other circuits have had opportunities to rule on similar cases,³ the importance of *Miller* lies in its novelty in the Seventh Circuit.

¹*United States ex rel. Miller v. Twomey*, 333 F. Supp. 1352 (N.D. Ill. 1971); *Green v. Bensinger*, No. 70-C-3056 (N.D. Ill., June 7, 1971); *Thomas v. Bensinger*, No. 71-C-56 (N.D. Ill., Feb. 30, 1971); *Krause v. Schmidt*, 341 F. Supp. 1001 (W.D. Wis. 1972); *Armstrong v. Bensinger*, No. 71-C-2144 (N.D. Ill., June 13, 1972); *Gutierrez v. Department of Pub. Safety*, No. 70-C-1778 (N.D. Ill., May 13, 1971). All of these were appealed, and were decided in *United States ex rel. Miller v. Twomey*, 479 F.2d 701 (7th Cir. 1973).

²42 U.S.C. § 1983 (1970). This section provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

³In *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), the court held that a minimally fair inquiry would require certain safeguards before a prisoner was confined to a psychiatric observation cell. The court suggested the following safeguards: adequate notice, an opportunity for the prisoner to reply to charges, and a reasonable investigation of the facts in cases of substantial discipline. *Id.* at 198.

Jones v. Robinson, 440 F.2d 249 (D.C. Cir. 1971), involved the procedural safeguards to be afforded a hospitalized inmate before transferring him to a maximum security unit. The court required as a minimum that: the officer conducting the inquiry be impartial, that he interview all witnesses himself and make written reports of the interviews available to the accused, that the accused be allowed confrontation and cross-examination of witnesses when the health of the patient allowed, that the accused be allowed to have a lay representative, that detailed records of proceedings, findings, and reasons for decisions be kept permanently, and that a decision to transfer a patient to a maximum security unit first have the approval of the hospital superintendent. *Id.* at 251-52.

Luther Miller,⁴ Andrew Green,⁵ and Jack Thomas⁶ each alleged that his statutory good time⁷ had been revoked without due proc-

In *Nolan v. Scafati*, 430 F.2d 548 (1st Cir. 1970), the court recognized that all the safeguards afforded a citizen charged with a crime could not be provided an inmate charged with a violation of prison rules but held that "some assurances of elemental fairness" are necessary when substantial individual interests are involved. *Id.* at 550.

⁴*Miller v. Twomey*, 333 F. Supp. 1352 (N.D. Ill. 1971). Miller alleged that ninety days of his statutory good time were revoked because he called an officer a foul name. He complained that the revocation proceedings were held *ex parte* and allowed him neither representation nor defense.

⁵*Green v. Bensinger*, No. 70-C-3056 (N.D. Ill., June 7, 1971). Green alleged that his good time was revoked on recommendation of three penal officers without having allowed him to appear in defense. The affidavit of Warden John J. Twomey of the Illinois State Penitentiary stated:

It is my understanding that prior to November 1970, the following procedure was used in revoking a prisoner's Statutory Good Time: The prisoner was called to the Isolation Building on a call ticket, the disciplinary charge was read to the prisoner, and he was asked whether it was true or false. On major violations of the rules, the two captains would decide what action was to be taken against the prisoner. If the charge was serious enough, they would also refer his case of [*sic*] the Merit Staff for further action. If the prisoner emphatically denied the charge, the captains would investigate the incident. When his case was referred to the Merit Staff, the charges would be read by the captain to the full committee, the case would be discussed, and they would recommend the penalties to be given to the prisoner. If the penalty was lost [*sic*] of Statutory Good Time, the recommendation would have to be approved by the Warden and then sent to the General Office in Springfield, Illinois, for the final approval of the Director of the Department of Corrections.

According to the records in Andrew Green's No. 57902 file, this course of action was followed in his case.

Brief for Appellees, Appendix A., United States *ex rel.* *Miller v. Twomey*, 479 F.2d 701 (7th Cir. 1973).

⁶*Thomas v. Bensinger*, No. 71-C-56 (N.D. Ill., February 30, 1971). Thomas alleged that without adequate hearing he was placed in solitary confinement and had one month of good time revoked. He admitted that he gave a letter to an officer to be mailed to an ex-inmate illegally, but objects to the procedure resulting in his punishment. Since Thomas was incarcerated in the Illinois State Penitentiary the same procedure outlined in note 5 *supra* was followed.

⁷These cases consider the revocation of good time credits in prison systems in which prisoners who comply with prison rules and regulations are entitled to a diminution of time from their sentences. These good time credits can be withheld or revoked for misconduct. Indiana and Wisconsin have similar statutes, IND. CODE §§ 11-7-6-1 to -3 (1971), WIS. STAT. ANN. § 53.11 (1967), but Illinois' good time statute was recently repealed, Act of Mar. 19, 1872, § 1, [1871-72] Ill. Laws 294 (repealed Ill. Pub. Act 77-2097, § 8-5-1, July 26, 1972).

ess.⁹ Herman Krause⁹ and Alfred Armstrong¹⁰ contended that they too were denied procedural safeguards prior to being placed in segregated confinement. Simon Gutierrez¹¹ alleged that his civil

⁹The fourteenth amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

⁹Krause v. Schmidt, 341 F. Supp. 1001 (W.D. Wis. 1972). Much property was damaged and many people injured in a riot which began in the prison dining room. The court found the procedure used in this case to be as follows:

The disciplinary committee, consisting of two associate wardens and a corrections officer, heard the charges against the plaintiff one week after the disturbance. The plaintiff was read the conduct report against him, which he had seen for the first time only three hours earlier. He was given an opportunity to explain what happened. The committee questioned him and retired to deliberate privately. The inmate was then sentenced to segregated confinement as punishment.

The court's findings regarding the various levels of confinement can be summarized as follows:

An inmate in the general population lives in a cell of adequate size and comfort and is allowed personal toiletries. He may attend school or participate in a work program, is allowed recreational time, is permitted to talk with others, and may accumulate good time credits.

One confined in "lower segregation" is not allowed to work, and may not retain personal toiletries. His cell is equipped with a hard bed with only one sheet and a pillow. He may leave his cell only thirty minutes per week, and he may not earn good time credits.

A prisoner in "upper segregation" rooms in a 12' x 5' cell and sleeps on a cot with no sheets or pillow. A light bulb is left on twenty-four hours per day. He may not leave his cell and may not talk to anyone. The only reading matter allowed is a Bible. He may not accumulate good time. This is called "the hole" by both the inmates and the administration.

¹⁰Armstrong v. Bensinger, No. 71-C-2144 (N.D. Ill., June 13, 1972). The court found that a fight broke out on the prison's baseball field and that when officers moved in they were surrounded and apparently threatened, but order was restored without the use of force. A cross-section of the prison staff was later surveyed to identify any inmates who could be considered security risks. About four months later, over one hundred of these security risks were transferred to the "Special Program Unit," which is designed to remove prisoners with serious behavioral problems from the prison's general population. The plaintiff was one of those transferred. 479 F.2d at 710.

¹¹Gutierrez v. Department of Pub. Safety, No. 70-C-1778 (N.D. Ill., May 13, 1971). Bobby Bright, who weighs about 225 pounds, assaulted fellow-

rights were violated when prison officials¹² failed to segregate a dangerous inmate from the general prison population and the inmate assaulted the plaintiff and injured him seriously.¹³ The respective district courts dismissed the complaints of Miller, Green, Thomas, and Gutierrez, and each appealed.¹⁴ Krause was granted

inmate Gutierrez, who is about ninety pounds lighter, with a baseball bat while the two were assigned to work in the Mechanical Store of the Illinois State Prison on November 20, 1968. Two years earlier Bright had hit another inmate with a baseball bat, and since then had been involved in two other altercations. 479 F.2d at 711.

¹²There are two groups of defendants—those who Gutierrez claims were negligent in their supervision of the work area and those who he claims were negligent in not segregating his assailant, Bright, from the general population. Negligence of the former type on only one occasion is insufficient to establish that “punishment” was inflicted under the eighth amendment, so the second group of defendants appears to be the more important of the two groups for the purposes of this action. See notes 13, 40 *infra*.

¹³The Gutierrez appeal is based on the eighth amendment, which provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

¹⁴The *Miller* trial court's order of July 22, 1971, provided:

Plaintiff's ‘Petition for Declaratory Judgment,’ treated as an action under 42 U.S.C. § 1983, dismissed as frivolous. 28 U.S.C. § 1915(d). It is not for the federal courts to review or regulate the reasonable disciplinary procedures of state penal institutions. See *Cole v. Smith*, 344 F.2d 721 (8th Cir. 1965); *United States ex rel. Atterbury v. Ragen*, 237 F.2d 953 (7th Cir. 1956), *cert. denied*, 353 U.S. 964.

479 F.2d at 704 n.3.

The *Green* trial court held that the plaintiff's allegations did not establish a failure to satisfy minimum constitutional requirements. The court, referring to *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), stated:

There the court held that the Constitution required only that the facts be rationally determined, including in most cases the opportunity of the inmate to confront his accuser and be informed of the evidence against him, and he be afforded a reasonable opportunity to explain his actions. If these measures are followed, an adequate balance between the needs of the orderly administration of the institution and the rights of the prisoner will result. The Constitution requires no more. . . .

479 F.2d at 706 n.9.

The *Thomas* trial court, relying on *Walker v. Pate*, 356 F.2d 502 (7th Cir. 1966), *cert. denied*, 384 U.S. 966 (1966), and rejecting the holding in *Sostre v. Rockefeller*, 312 F. Supp. 863 (S.D.N.Y. 1970), held that prison officials could use programs of isolation and segregated confinement without violating the fourteenth amendment, as long as they did not act so arbitrarily or so prejudicially that their conduct offended basic principles of fairness.

preliminary relief, with certain procedures ordered in any further hearings, and prison officials appealed.¹⁵ Armstrong's legal contentions were accepted, but he appealed, arguing that the relief granted was insufficient.¹⁶

The *Miller* court concentrated on three main issues: the disallowance of statutory good time, punitive segregation, and the failure to adequately protect inmates from one another. The first two issues were considered in light of *Morrissey v. Brewer*,¹⁷ decided by the Supreme Court while these appeals were pending. In *Morrissey* the Court held that parole revocation deprived the parolee of his liberty, and that he was thus constitutionally entitled to certain minimum procedural safeguards at a parole revocation

In the Gutierrez case a special commissioner had investigated the incident prior to the district court's ruling and had suggested that if the plaintiff had any remedy at all, it was a negligence claim in the Illinois courts. The district court seemed to dismiss the complaint for similar reasons.

¹⁵The trial court enjoined the defendants from conducting any further hearings concerning the plaintiff until such hearings included: timely and adequate notice of the charges, an opportunity for the plaintiff to confront and cross-examine adverse witnesses, an opportunity to retain counsel or counsel substitute, an impartial decision-maker, and a summary of the evidence on which the decision is based. See *Morales v. Schmidt*, 340 F. Supp. 544 (W.D. Wis. 1972), *rev'd.*, No. 72-1373 (7th Cir., Jan. 17, 1973), *petition for rehearing granted*, (7th Cir., May 22, 1973).

¹⁶The trial court found that the Special Program Unit was a form of punishment and ordered that before an inmate was placed in the unit he should be afforded "an administrative hearing which would reasonably satisfy the concept of due process. . . . [H]e should be informed of all of the accusations against him and given an opportunity to respond to such charges." 479 F.2d at 710. See also *Thomas v. Pate*, 445 F.2d 105 (7th Cir. 1971).

¹⁷408 U.S. 471 (1972), noted in *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 95 (1972); see Rose, *Conditional Liberty and the Fourteenth Amendment*, 33 U. PITT. L. REV. 638 (1972).

Two alleged parole violators had their paroles revoked without hearings by the Iowa Parole Board. They were returned to prison. The Supreme Court reversed an Eighth Circuit decision, 443 F.2d 942 (8th Cir. 1971), which had denied relief, outlining two general "minimum requirements of due process." 408 U.S. at 489. First was proper preliminary inquiry and second was a timely hearing. The procedural safeguards listed were: 1) written notice of the alleged violations, 2) disclosure to the parolee of the evidence against him, 3) an opportunity to be heard and to present witnesses and evidence, 4) confrontation and cross-examination of adverse witnesses (unless the hearing officer finds good cause not to allow such), 5) a "neutral and detached" hearing body, and 6) a written report by the hearing body of the evidence and reasoning. *Id.* at 488-89.

hearing.¹⁸ The majority noted that although *Morrissey* is directly applicable only to parole revocation, its rejection of a line of Eighth Circuit cases regarding the wide discretion of prison officials warranted a re-examination of the extent to which that discretion remains unreviewable. *Morrissey* dealt with legal custody pursuant to criminal conviction and held that parolees in such custody had a sufficient interest in liberty to warrant due process. The *Miller* court read *Morrissey* to portend a basic concept: liberty protected by the due process clause must, to some extent, coexist with legal custody pursuant to conviction. The *Miller* court stated that the deprivation of liberty following an adjudication of guilt is partial, not total, and that a residuum of constitutionally protected rights remains.¹⁹ The majority further noted that *Morrissey* should not be narrowly limited by a distinction between physical confinement and conditional liberty to live in society. The *Morrissey* decision requires that due process precede any substantial deprivation of the liberty of persons in custody.²⁰ It remains clear, however, that due process is a flexible concept, depending on the various interests involved,²¹ with only significant

¹⁸408 U.S. at 489. Inherent in the right to a hearing is the right to a fair hearing which can accurately determine the relevant facts in dispute. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1962); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971).

¹⁹The court went on to say that:

The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual. 'Liberty' and 'custody' are not mutually exclusive concepts.

479 F.2d at 712.

²⁰*Id.*

²¹The word "due" is deliberately broad to allow different procedural requirements under different circumstances. See *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971); *Clutchette v. Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971).

In *Hagopian v. Knowlton*, 470 F.2d 201 (2d Cir. 1972), the court held that a military cadet who was rendered subject to separation due to accumulated demerits had to be granted a hearing with the right to appear and present witnesses and evidence, but need not be accorded the right to representation by counsel. The court stressed the flexibility of due process, saying that it was not a rigid formula, but rather a flexible one which depended upon the balancing of various factors. *Id.* at 207.

Compare *Goldberg v. Kelly*, 397 U.S. 254 (1970) (the loss of welfare benefits), with *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970), and *Brown v. Housing Authority*, 340 F. Supp. 114 (E.D. Wis. 1972) (the loss of a public housing tenant's lease).

deprivations of liberty raising constitutional issues.²²

After brief analysis of the impact of *Morrissey*, the majority turned to the issues at hand, and analyzed them in light of *Morrissey* concepts. The approach was basically a two-step inquiry: Were the challenged actions serious enough to amount to deprivations of liberty, and if so, were the prisoners afforded due process?

In the first part of the opinion it seemed that the majority would adopt the minimum procedural safeguards outlined in *Morrissey* and would apply them to the revocation of statutory good time, but the decision ultimately provided for application of only half of the *Morrissey* safeguards.²³ The reasoning was inexplicable, as Chief Judge Swygert pointed out in a vigorous and persuasive dissent. The majority concluded from its analysis of *Morrissey* that the due process clause applies to the revocation of good time credits since cancellation of good time would inflict a similar grievous loss of liberty on the inmate as the revocation of parole does on the parolee.²⁴ The majority then outlined the *Morrissey* safeguards and submitted that procedural due process for the revocation of good time credits would certainly be met with such precautions. The majority went on to state that until "the rule-making process" had been given an opportunity to develop more fully, it felt that the minimum constitutional requirements were advance written notice of the hearing, a dignified hearing in which the accused could be heard and allowed to call other witnesses, and an impartial decision maker.²⁵ It was thus deemed inappropriate to attempt to define the constitutional requirements more specifically and the court avoided the question to some extent. Reluctance to give *Morrissey* full effect in this situation can only be considered, as the dissent suggested, an overabundance of caution in a constitutional area already too slow in developing. The question avoided will only need to be answered in the future, not only at further monetary expense, but also at the expense inherent in a continued period of uncertainty in the area.

²²408 U.S. at 481.

²³Compare note 17 *supra*, which lists the *Morrissey* safeguards, with the discussion following in the text, which lists the *Miller* requirements. This comparison would indicate that the *Miller* court has not provided for disclosure to the parolee of evidence against him, confrontation and cross-examination of adverse witnesses, and a written report of the evidence and reasoning, all of which are provided for in *Morrissey*.

²⁴479 F.2d at 715.

²⁵*Id.*

On the question of punitive segregation, the majority adopted the test Chief Justice Burger used in *Morrissey*, i.e., the procedural precautions necessary depend on the extent to which an individual will be condemned to suffer a grievous loss.²⁶ The majority noted that every adverse change in a prisoner's status cannot be considered a grievous loss of liberty in that minor deprivations are inevitable in a prison community. However, the records in the cases of Armstrong and Krause, involving segregation following violent disturbances, reflected a sufficient contrast between life in the general prison population and life in segregated confinement to be classified as a grievous loss of liberty. The court was cognizant of the possibility of circumstances in which the government's interest in prompt action may outweigh an individual prisoner's interest in proper procedure.²⁷ Armstrong and Krause are examples of the ever present danger of violence in a prison community. However, after the danger has passed, the state's interest in summary disposition lessens, and the prisoner's interests warrant procedural safeguards.

The majority found a lesser interest in liberty and a greater state interest in summary disposition of interprison disciplinary matters than of parole revocation matters. Based on that rationale, it adopted *Morrissey* safeguards as the maximum protection required for due process in in-prison disciplinary proceedings.²⁸ In any case involving a grievous loss, the court adopted as a "bare minimum" those same standards held applicable for proceedings to revoke statutory good time. Such minimum standards went beyond the standards required by the trial court in the case of Armstrong.²⁹ But the relief granted Krause by the trial court³⁰ exceeded the *Morrissey* standards, which the *Miller* majority had set as a maximum. Therefore, the *Miller* court remanded both cases for modification in accordance with its guidelines.

²⁶*Id.* at 717.

²⁷See *Prisoners' Rights and the Correctional Scheme: The Legal Controversy and Problems of Implementation—A Symposium*, 16 VILL. L. REV. 1029 (1971); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

²⁸479 F.2d at 718.

²⁹The inmate had to be informed of the accusations against him and given a chance to respond according to the *Armstrong* trial court. See note 16 *supra*. The *Miller* standards thus went beyond those required by that court.

³⁰The *Krause* trial court required adequate notice, confrontation and cross-examination of adverse witnesses, counsel or counsel substitute, an impartial decision-maker, and a summary of the evidence. See note 15 *supra*. These exceeded not only the *Miller* standards, but also the *Morrissey* standards.

Chief Judge Swygert, dissenting, disagreed with the idea that the state holds a greater interest in summary disposition of in-prison disciplinary cases than in parole revocation matters. He agreed that the state has a legitimate interest in expedited discipline when proper procedure would endanger the institution with widespread violence, but insisted that when the threat of violence passes, the state has no interest in summary disposition of the case greater than the interest it would have in summarily returning a parole violator to prison if he had been in state custody. For that reason, Judge Swygert felt that the *Morrissey* standards should be applicable whenever prison officials attempted to segregate an inmate for nonimmediate punishment, *i.e.*, whenever segregation operated as a grievous loss of that inmate's liberty.³¹

Concerning the Gutierrez issue, the majority affirmed the trial court order dismissing his eighth amendment claim. The court recognized two ways in which the amendment could be

³¹The arguments of the majority and dissent appeared diametrically opposed, but they actually were based on similar thoughts. Both recognized a need in certain instances for summary disposition by prison officials, and both also realized the need for due process for those who stood to suffer a grievous loss of liberty. The majority stated:

In any case which may involve 'grievous loss,' we believe the bare minimum is that applicable to a proceeding which may result in the revocation of statutory good time, namely, an adequate and timely written notice of the charge, a fair opportunity to explain and to request that witnesses be called or interviewed, and an impartial decision-maker.

479 F.2d at 718.

However, the majority did not express itself clearly. In the situation of potential violence, requiring summary disposition by prison officials, "grievous loss" may result, but the majority would hold the state's interest to be greater than the inmate's and not afford the inmate immediate procedural safeguards. But after the potential violence has been neutralized, probably by temporary segregated confinement of the troublemakers, it seems that the majority would find it reasonable to grant the inmate procedural safeguards before segregating him for a long term. The dissent was more carefully worded when it stated, ". . . I view *Morrissey* as applying with full force whenever prison officials seek long term segregation for one in their charge." *Id.* at 723 (Swygert, C.J., dissenting). This would impliedly account for the situation where violence had to be avoided by summarily confining an inmate temporarily. That leaves as the only real difference between the majority view and dissent the number of safeguards which should be made applicable, with the dissent arguing that the majority is inconsistent to recognize a potential "grievous loss" and then deny the prisoner the minimum safeguards outlined in *Morrissey*.

violated: intentional infliction of punishment which is cruel³² or such callous indifference to the predictable consequences of the situation that an intent to inflict harm may be inferred.³³ It construed the legal question to be whether a correction officer is subject to section 1983 liability when he accepts the admittedly foreseeable risk of violence by allowing a potentially dangerous inmate to associate with the general population and such violence actually occurs.³⁴ The majority reasoned by analogy, which it admitted was not decisive, that if the plaintiff's theory were held valid, parole boards might be required to defend their exercise of discretion when a parolee committed a foreseeable attack on another citizen.³⁵ It implied that a similar argument, that judicial review would inhibit the exercise of prison officials' discretion, could be made in the instant case. The majority submitted that the placement of a dangerous inmate should not present the prison official with a "Hobson's choice" between eighth amendment claims—segregation based on inadequate criteria, subjecting him to a claim by the segregated prisoner, or failure to segregate, giving rise to a claim by anyone in the general population who is assaulted by the dangerous inmate. The majority insisted that even if the prison officials made an erroneous decision due to negligence, the eighth amendment was still not violated.³⁶

It would seem that the majority misconstrued the issue in the Gutierrez case. The potentially dangerous inmate in this case was not, as the majority put it, "permitted to associate with the general

³²See *Furman v. Georgia*, 408 U.S. 238 (1972); *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968); *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967).

³³See *Francis v. Resweber*, 329 U.S. 459 (1947); *Williams v. Field*, 416 F.2d 483 (9th Cir. 1969); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970); *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966).

³⁴479 F.2d at 720. It is an established principle that a person confined in a state or county prison is within the protection of 42 U.S.C. § 1983 (1970), and the right of a state prisoner to be free from cruel and unusual punishment or to be within the protection of the eighth amendment is one of the rights that a state prisoner in a proper case may enforce under section 1983. *Roberts v. Williams*, 302 F. Supp. 972 (N.D. Miss. 1969); *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966); *Redding v. Pate*, 220 F. Supp. 124 (N.D. Ill. 1963).

³⁵479 F.2d at 721.

³⁶*Id.* The majority argued that if the prison officials were guilty only of negligence, then there was no intent to inflict harm and thus no violation of the eighth amendment. However, it seems to have overlooked the second recognized way in which the amendment could be violated, *i.e.*, callous indifference to predictable consequences such that intent can be inferred.

population.”³⁷ Rather, Gutierrez, along with Bright, was assigned to manage the prison’s Mechanical Store, which housed numerous weapons³⁸ and was unguarded by prison officials.³⁹ As the dissent noted, a prisoner like Gutierrez does not have the option available to a free man, to flee dangerous circumstances. It would appear that Gutierrez, rather than the prison officials, was presented with the “Hobson’s choice,” in that punishment was inevitable—be it a result of neglecting his assignment and being punished by prison authorities or be it at the hands of a dangerous man provided with weaponry. Simple negligence probably cannot constitute “punishment,” but when that negligence is allowed to rise to gross negligence or recklessness, and a prisoner is injured as a result, that injury is cruel and unusual punishment and should be actionable under 42 U.S.C. section 1983, regardless of subjective intent or lack thereof.⁴⁰

³⁷*Id.*

³⁸According to a prison employee, the Mechanical Store also housed equipment such as ax and sledge hammer handles, iron pipe, and pieces of steel—all available as weaponry. Affidavit of M. F. Riley, Exhibit C. to Response, *Gutierrez v. Department of Pub. Safety*, No. 70-C-1778 (N.D. Ill., May 13, 1971). 479 F.2d at 724.

³⁹Riley was the nearest employee, and he was approximately 120 feet from Gutierrez and Bright at the time of the incident. 479 F.2d at 724.

⁴⁰*See Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1971), in which the court stated:

Thus in an Eighth Amendment case, if there were, as here, no conscious purpose to inflict suffering, we would look next for a callous indifference to it at the management level, in the sustained knowing maintenance of bad practices and customs. When prison wardens are cruel in their attitudes, negligent as well as intended injuries result.

Id. at 827.

In *Roberts*, a prisoner brought an action in federal court for injuries sustained as a result of the intentional discharge of a shotgun being carried by a trustee of the prison at the time. The theory of recovery was that the prison officials were negligent in arming trustees without any supervision or instruction in the use of weapons. At trial, the evidence showed that the firing was an accident, but the district court held the officials liable under both Mississippi tort law and under 42 U.S.C. § 1983 (1970).

The conduct need not be an intentional infliction of harm. It may, instead, consist of the knowing maintenance of conditions, customs, and practices that are so excessively cruel and inhuman as to shock the general conscience. *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970). The injuries suffered by the prisoners in *Holt* were not intended by the prison officials, but they continued both the trustee and barracks systems even after they were made aware of the serious abuses that each system fostered. Intent is inferred from con-

The courts have traditionally been reluctant to review prison officials' administrative actions.⁴¹ Although this reluctance has received much judicial support,⁴² it has begun to be rejected as a viable concept.⁴³ This court had the opportunity to decide *Miller* within this developmental area but took a disappointing step backwards. The court recognized that the prisoner who was to have good time credits revoked or was to be segregated from the general prison population as punishment stood to suffer the same grievous loss of liberty talked of in *Morrissey*, yet the court accepted only half the procedural safeguards the *Morrissey* court had deemed minimal. Then the court misconstrued the issue in the Gutierrez

ditions that cause more than an isolated instance of injury, that are known to prison authorities, and maintained in spite of the dangers.

See also Francis v. Resweber, 329 U.S. 459 (1947); Williams v. Field, 416 F.2d 483 (9th Cir. 1969); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

⁴¹This has been called the "hands-off doctrine," a term first used in COMM. FOR THE FEDERAL BUREAU OF PRISONS, CIVIL RIGHTS OF FEDERAL PRISON INMATES 31 (1961). It declares that courts are "without power to supervise prison administration or to interfere with the ordinary prison rules or regulations." Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954).

⁴²*E.g.*, Kostal v. Tinsley, 337 F.2d 845 (10th Cir. 1964), *cert. denied*, 380 U.S. 985 (1965); Harris v. Settle, 322 F.2d 908 (8th Cir. 1963), *cert. denied*, 377 U.S. 910 (1964); Childs v. Pegelow, 321 F.2d 487 (4th Cir. 1963), *cert. denied*, 376 U.S. 932 (1964); Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961); Sherwood v. Gladden, 240 F.2d 910 (9th Cir. 1957); Tabor v. Hardwick, 224 F.2d 526 (5th Cir.), *cert. denied*, 350 U.S. 971 (1955); Ortega v. Ragen, 216 F.2d 561 (7th Cir. 1954), *cert. denied*, 349 U.S. 940 (1955); Siegel v. Ragen, 180 F.2d 785 (7th Cir.), *cert. denied*, 339 U.S. 990 (1950).

⁴³In *Landman v. Peyton*, 370 F.2d 135 (4th Cir. 1966), *cert. denied*, 388 U.S. 920 (1967), the court stated:

Under our constitutional system, the payment which society exacts for transgression of the law does not include relegating the transgressor to arbitrary and capricious action. . . . Where the lack of effective supervisory procedures exposes men to the capricious imposition of added punishment, due process and eighth amendment questions inevitably arise.

Id. at 141.

Then in *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd.*, 390 U.S. 333 (1968), the court said that prisoners do not lose all their constitutional rights and that the due process clause of the fourteenth amendment follows them into prison, and protects them from unconstitutional actions on the part of prison authorities. *Id.* at 331.

In *Johnson v. Avery*, 393 U.S. 483 (1969), the Supreme Court of the United States remarked that state regulations are applicable to state prison

case and applied a narrow reading of the eighth amendment to it.⁴⁴

The court's caution was misdirected. A heavy burden should lie upon anyone who attempts to deny constitutional protection to anyone else.⁴⁵ The court should have been cautious in denying a prisoner constitutional rights; however, it was overly cautious in the wrong direction, to the point of rejection of those rights. The court, itself part of the "rule-making process"⁴⁶ it speaks of, has

administration, but when there are conflicts with federal or constitutional rights the state regulations may be invalidated. *Id.* at 486.

Such thought made application of due process principles possible in regard to the prison. In *Morris v. Travisono*, 310 F. Supp. 857 (D.R.I. 1970), the court adopted several procedural safeguards for prison administration, e.g., inmates must be given notice of any charges against them, investigation of the charges must be made by a superior officer, there must be an administrative determination of guilt before the prisoner has good time credits revoked or is segregated from the general prison population, the administrative board must be made up of people from the prison's custody and treatment departments, the reporting officer must not sit on the board, the prisoner is entitled to representation by a prison employee, may present information available to him, but has no right of confrontation, a record of the hearing must be made, and the decision must be based on substantial evidence. *Id.* at 871-74.

More recent cases have attempted to crystallize and implement these standards to other specific situations. *E.g.*, *Nolan v. Scafati*, 430 F.2d 548 (1st Cir. 1970); *Shone v. Maine*, 406 F.2d 844 (1st Cir. 1969); *Carothers v. Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970); *Kritsky v. McGinnis*, 313 F. Supp. 1247 (N.D.N.Y. 1970). See also Millemann, *Prison Disciplinary Hearings and Procedural Due Process—The Requirement of a Full Administrative Hearing*, 31 MD. L. REV. 27 (1971); Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841 (1971).

⁴⁴See note 40 *supra*.

⁴⁵It would seem that this is so fundamental that no discussion or authority need be cited. However, for those who tend to resist procedural due process for prisoners, it may be a starting point. A visit to a state prison may be what is necessary to convince the skeptical that procedural safeguards are needed, but very few ever get that opportunity. A substitute is to read about some of the inequities which emerge from a prison without procedural justice, e.g., the inmate who loses a year of freedom at the whim of a guard who happens to be in bad mood that day or the inmate who is confined in "the hole" for walking down the hall too slowly. Some of the following articles indicate that this type of "justice" happens every day in our prisons, and that procedural safeguards are indeed necessary: Oxberger, *Revolution in Corrections*, 22 DRAKE L. REV. 250 (1973); Rabinowitz, *The Expression of Prisoners' Rights*, 16 VILL. L. REV. 1047 (1971); Sheehan, *Prisoners' Redress for Deprivation of a Constitutional Right: Federal Habeas Corpus and the Civil Rights Act*, 4 ST. MARY'S L.J. 315 (1972); Note, *Prisoners' Rights Under Section 1983*, 57 GEO. L.J. 1270 (1969).

⁴⁶479 F.2d at 716.

set narrow guidelines⁴⁷ for courts considering similar problems in the future. If our penal system ever is to consider rehabilitation as something other than nonsense,⁴⁸ courts must surpass the timid guidelines set by the *Miller* court and take strides forward to grant prisoners all the federal rights possible in a prison community.⁴⁹

⁴⁷In *Hagopian v. Knowlton*, 470 F.2d 201 (2d Cir. 1972), the court stated:

Because of the factors controlling what process is due usually vary from case to case, prior decisions on the subject cannot ordinarily furnish more than general guidelines which might give the reader a 'feel' for what is fundamentally fair in a particular instance.

Id. at 209.

⁴⁸See Rabinowitz, *The Expansion of Prisoners' Rights*, 16 VILL. L. REV. 1047 (1971), in which it is noted that the vast majority of our prisons are good for only two purposes: punishment and quarantine, with any talk of reform or rehabilitation being ludicrous. If we begin treating prisoners as people rather than animals then maybe rehabilitation will become something more than nonsense.

⁴⁹We have already begun to see the effects of *Miller*. In *Adams v. Carlson*, No. 73-1268 (7th Cir., Aug. 23, 1973), *Miller* was held to apply retroactively. Also, the Indiana Department of Corrections has adopted (effective Aug. 27, 1973) new disciplinary rules for adult institutions which are patterned largely after *Miller*. It should be with a feeling of some remorse that the judiciary sees such bare minima used as precedent. Although it can be said that *Miller* represents some improvement, greater expectations continue, as does the need for greater procedural safeguards in our prisons.